87 918

No. .....

Supreme Court, U.S.
FILED
NOV 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

—o—

STEVEN K. SMITH, individually
and as a general partner of
SMITH & SMITH,
Appellant,

v.

FLORIDA DEPARTMENT OF BUSINESS
REGULATION, DIVISION OF LAND
SALES, CONDOMINIUMS AND
MOBILE HOMES,
Appellee.

—o—

On Appeal to the United States Supreme Court

—o—

JURISDICTIONAL STATEMENT

—o—

ROBERT E. AUSTIN, JR.,
Counsel of Record, and
JERRI A. BLAIR OF
AUSTIN, LAWRENCE & LANDIS
Post Office Drawer 1930
Leesburg, FL 32749-1930
(904) 728-1020

Attorneys for Appellant

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER OR NOT SECTION 721.17, FLORIDA STATUTES (1981) IS VOID FOR VAGUENESS SINCE IT FAILS TO GIVE NOTICE TO THIRD PARTY TRANSFEREES THAT FAILURE TO PROVIDE WRITTEN GUARANTEES OF ASSUMPTION OF THE SELLER'S RESPONSIBILITIES TO TIME SHARE PURCHASERS IS A VIOLATION OF THE STATUTE WHICH COULD RESULT IN A CIVIL PENALTY.

II. WHETHER OR NOT THE DIVISION'S FINAL ORDER REQUIRING SMITH TO ASSUME RESPONSIBILITY TO THE TIME SHARE PURCHASERS WAS AN INVALID RETROACTIVE APPLICATION OF SECTION 721.17, FLORIDA STATUTES (1983).

III. WHETHER OR NOT THE DIVISION HAS ARBITRARILY EXPANDED THE SCOPE OF THE 1981 STATUTE TO INCLUDE REGULATION OF THIRD PARTY TRANSFEREES.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Cases	iii
Statutes	iii
Other Authority	iv
Opinions Delivered in the Courts Below	1
Jurisdictional Statement	1
Applicable Provisions of Law	2
Statement of the Case	5
Statement of Reasons Why the Questions Presented Are So Substantial As to Require Plenary Consideration	9

TABLE OF CITATIONS

CASES

Page

Addison v. Holly Hill Fruit Products, 322 U.S. 607, 64 S.Ct. 1215 (1944) 14, 15

Diebold, Inc. v. Marshall, 585 F.2d 1327 (6th Cir. 1978) 10, 11, 13

Florida Businessmen for Free Enterprise v. State of Florida, 499 F.Supp. 346 (N.D. Fla. 1980) 10

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) 11

Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984) 10

Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939) 10

Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) 10

Levas & Levas v. Village of Antioch, Illinois, 684 F.2d 446 (7th Cir. 1981) 11, 15

Seddon v. Harpster, 403 So.2d 409 (Fla. 1981) 14

Smith v. Department of Business Regulation, 504 So.2d 1285 (Fla. 1st DCA 1986) 1

United States v. Iusco, 496 F.2d 204 (5th Cir. 1974) 10

STATUTES

Florida Statutes

Section 721.05(12) (1981) 2, 12

Section 721.08 (1981) 5, 6

Section 721.17 (1981) 3, 6, 7, 8, 9, 12, 16

Section 721.17 (1983) 4, 8, 13, 14

TABLE OF CITATIONS—Continued

Page

OTHER AUTHORITY

United States Constitution

Fourteenth Amendment 2, 10, 15

Section 721.05(5) (1981) 2

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Department of Business Regulation, State of Florida, is not reported. The opinion of the District Court of Appeal for the First District of Florida is reported at *Smith v. Department of Business Regulation*, 504 So.2d 1285 (Fla. 1st DCA 1986). The opinion of the Supreme Court of Florida is not reported.

JURISDICTIONAL STATEMENT

The decision appealed from is a decision of the District Court of Appeal for the First District of Florida where there was drawn in question the validity of a statute of the State of Florida on the ground of it being repugnant to the Constitution of the United States and the decision was in favor of its validity.

The opinion of the First District was entered on December 31, 1986. Appellant moved for rehearing or clarification and rehearing was denied on March 19, 1987. Appellant sought review by the Florida Supreme Court and the petition was denied on August 28, 1987. The notice of appeal to the United States Supreme Court was filed October 23, 1987, in the District Court of Appeal for the First District of Florida.

This court has jurisdiction pursuant to 28 U.S.C. § 1257.

APPLICABLE PROVISIONS OF LAW

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws. United States Constitution, Amendment XIV, Section 1.

"Developer" means the person creating a time sharing plan. § 721.05(5), Fla. Stat. (1981).

"Seller" means any developer or any other person, or agent or employee thereof, who is offering time share periods for sale to the public in the ordinary course of business, except a person who has acquired a time share period for his own occupancy and later offers it for resale. § 721.05(12), Fla. Stat. (1981).

No seller shall sell, lease, assign, mortgage, or otherwise transfer the seller's interest in the accommodations or facilities of a time sharing plan to a third party, unless:

(1) The third party agrees in writing to honor fully the rights of the purchasers of the time sharing plan to occupy and use the accommodations or facilities.

(2) The third party agrees in writing to honor fully the rights of purchasers of the time sharing plan to cancel their contracts and receive appropriate refunds, as provided in this chapter.

(3) The third party agrees in writing to comply with the provisions of this chapter for as long as the third party continues to sell the time sharing plan or for as long as purchasers of the time sharing plan are entitled to occupy the accommodations or use the facilities, whichever is longer in time.

(4) The third party agrees to assume all obligations of the seller to purchasers.

(5) Notice is mailed to each purchaser of the time sharing plan affected thereby within thirty days of the sale, lease, assignment, or other transfer.

Persons who hold mortgages on the property constituting a time sharing plan before the public offering statement of such plan is approved by the Division shall not be considered third parties for the purposes of this section. § 721.17, Fla. Stat. (1981).

Except for those time share plans subject to the provisions of Chapter 718 or Chapter 719, no developer or owner of the underlying fee shall sell, lease, assign, mortgage, or otherwise transfer the owner's or developer's interest in the accommodations or facilities of the time share plan except by an instrument evidencing the transfer recorded in the public records of the county in which the accommodations or facilities are located. This instrument shall be executed by both the transferor and the transferee and shall state:

(1) That its provisions are intended to protect the rights of all purchasers of the plan.

(2) That its terms may be enforced by any prior or subsequent time share purchaser so long as that purchaser is not in default of his obligations.

(3) That the transferee will fully honor the rights of the purchasers to occupy and use the accommodations and facilities as provided in their original contracts and the time share instruments.

(4) That the transferee will fully honor all time share purchasers' rights to cancel their contracts and receive appropriate refunds.

(5) That the transferee's obligations thereunder will continue to exist despite any cancellation or rejection of the contracts between the developer and purchaser arising out of bankruptcy proceedings.

Should any transfer of the interest of the developer or owner of the underlying fee occur in a manner not in compliance with the above, the terms set forth in this section shall be presumed to be part of the transfer and shall be deemed to be included in the instrument of transfer. Notice shall be mailed to each purchaser of record within thirty days of the transfer. Persons who hold mortgages on the property constituting a time share plan before the public offering statement of such plan is approved by the Division shall not be considered transferees for the purposes of this section. § 721.17, Fla. Stat. (1983).

STATEMENT OF THE CASE

This is an appeal from a decision by the District Court of Appeal for the First District of Florida affirming the findings of appellee, the Florida Department of Business Regulation, Division of Land Sales, Condominiums, and Mobile Homes ("the Division").

This action arose out of the development and sale of time share unit weeks at a motel which was being purchased by Daytona Sands Beach Club, Inc. ("Beach Club") from Daytona Sands, Inc. ("Sands"). On May 8, 1981, Sands entered into an agreement for deed for sale of the motel with International Time Share Consultants, Inc. ("ITSC"). Prior to closing, ITSC experienced financing difficulties, and Beach Club was formed from ten interested investors, including three principals of ITSC, for purposes of developing the time share project. The agreement for deed was assigned to Beach Club.

The agreement for deed contained a complicated payment schedule which provided, among other things, that Sands received automatic transfer of the time share purchasers' sales contracts, and concomitantly the right to receive payment under the sales contracts. The agreement for deed also provided for automatic transfer of all the purchasers' sales contracts to Sands.

Because Beach Club was a "right-to-use" project which did not transfer a property interest with the purchase of a unit week, Section 721.08, Florida Statutes (1981), required that the seller escrow fifty percent of all monies accepted from the purchaser, post a security bond in that amount, or provide the purchaser with a nondisturbance agreement. From the beginning, sales were made

out of units which had not been released by Sands as required by the agreement for deed, and without the protections required by Section 721.08.

The project was undercapitalized from the beginning. In the fall of 1981, Beach Club sought financing from appellant, Steven K. Smith, individually and as a general partner, Smith & Smith, a Kentucky general partnership ("Smith").

On December 4, 1981, Smith and Beach Club entered into an agreement under which Smith provided Beach Club with $21,000.00 in financing and received as collateral a transfer of twenty-eight sales contracts for previously sold unit weeks and six unsold unit weeks which were to be replaced with sales contracts as soon as they became available. Sands agreed to the transfer to Smith of the twenty-eight sales contracts. In transferring the sales contracts to Smith, Beach Club transferred the right to receive payment under the sales contracts.

In February of 1982, the project closed down and the time share purchasers did not receive their unit weeks.

This action was commenced on May 13, 1983, by the Division against Smith. The Division accused Smith of failure to comply with Section 721.17, Florida Statutes (1981), in acquiring an interest in the time share development Beach Club. This case was consolidated with the Division's case against ITSC, Beach Club, and Sands.

The Division found that ITSC knowingly violated the statute by failing to provide nondisturbance agreements, maintain escrow accounts, or provide any of the protections required under Section 721.08, Florida Statutes (1981), and that ITSC fraudulently sold the units to the

time share purchasers. The Division fined ITSC $10,000.00. The Division did not pursue an action against Beach Club, although Beach Club managed and operated the project. The Division found that the transfer of the contracts to Sands was insufficient to place Sands in the position of a seller which could be regulated under the statute.

On the other hand, the Division's sole claim of violation by Smith is an alleged violation of Section 721.17, Florida Statutes (1981), arising out of the transfer to Smith of sales contracts pursuant to the December 4 agreement. The Division claimed that Smith violated the statute by failing to provide the written guarantees enumerated in Section 721.17, Florida Statutes (1981), upon execution of the December 4 agreement.

It is undisputed that at the time of execution of the contract, Smith was completely unaware of the statutory violations, while Beach Club and Sands knew the project was subject to penalties. No party has ever made a claim that Smith was informed of Beach Club's or ITSC's statutory violations prior to entering into the December 4 agreement.

The Division ordered Smith to pay a $5,000.00 fine and to take full responsibility for reimbursement of all time share purchasers whose contracts were transferred to Smith and to all time share purchasers who entered into contracts with Beach Club subsequent to December 4, 1981.

Smith brought an appeal in the First District from the Division's final order.

Smith argued that Section 721.17, Florida Statutes (1981), is unconstitutionally vague, in violation of the Fourteenth Amendment of the United States Constitution because it fails to provide sufficient notice to third party transferees, such as Smith, that the transferee's failure to agree in writing to the statutory guarantees constitutes a violation of the statute which could result in a civil penalty. Smith's contention is based upon the plain language of the statute which clearly provides the seller with notice of an obligation to assure continued protection of the purchasers' interests, but fails to provide notice of any reciprocal obligation to transferees. The First District expressly declared that Section 721.17, Florida Statutes (1981), provides sufficient notice to third party transferees of an affirmative obligation to execute written guarantees and of the potential for civil penalty upon failure to do so.

Smith further argued that the Division retroactively applied Section 721.17, Florida Statutes (1983). In 1983, the legislature amended Section 721.17 so that the terms set forth in that section were presumed to be part of any transfer of interest covered by that statutory section. The First District held that the statute did apply to Smith. The First District used the 1983 statute in interpreting the 1981 statute to include an affirmative obligation upon the part of a third party transferee under Section 721.17. In holding that the 1983 statute was not retroactively applied, the First District upheld the sufficiency of the notice provided by the 1981 statute to third party transferees.

Smith further argued that Section 721.17, Florida Statutes (1981), failed to provide the Division with adequate guidelines for regulation of third parties such as Smith. As a result of the failure of the legislature to pro-

vide such guidelines, the Division enforced the statute in an arbitrary and capricious manner. The First District held that the Division merely fulfilled the purposes of the statute in requiring Smith to assume the seller's responsibilities to all time share purchasers who entered into contracts with Beach Club after December 4.

Smith moved for rehearing after entry of the First District's order and the First District clarified its opinion, but denied rehearing on the merits. Smith then sought certiorari review by the Florida Supreme Court. The Florida Supreme Court refused to accept jurisdiction.

The questions sought to be reviewed were raised in oral argument in the proceeding before the hearing officer at the administrative hearing, in briefs and oral arguments on appeal in the First District, in written argument on the motion for rehearing or clarification in the First District, and as part of the jurisdictional brief to the Florida Supreme Court. All of the administrative bodies and courts have held that Section 721.17, Florida Statutes (1981), does provide adequate notice of violation to persons other than sellers and that the 1983 statute was not retroactively applied.

STATEMENT OF REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

Smith, the only out-of-state party involved in this action, has been required by the Division to provide reimbursement to the time share purchasers, including those

whose contracts were not assigned to him, of funds which were paid to Sands and Beach Club. It is clear that he has been deprived of a property interest subject to the protection of the Fourteenth Amendment.

The Fourteenth Amendment expresses a requirement of fundamental fairness. *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed. 2d 640 (1981). The guarantee of due process under the Fourteenth Amendment prohibits vague statutes. *Florida Businessmen for Free Enterprise v. State of Florida*, 499 F.Supp. 346 (N.D. Fla. 1980). Simple fundamental fairness requires that a statute set out prohibited conduct in terms people of ordinary intelligence can readily understand. *Id.* Clarity is required so that potential offenders receive fair notice and protection from unequal enforcement. *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984).

It is a fundamental tenant of our jurisprudence that statutes which proscribe conduct may not be so inartfully worded that persons of common intelligence must speculate as to their meaning. *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939); *United States v. Insco*, 496 F.2d 204, 208 (5th Cir. 1974). Vaguely phrased measures run afoul of substantive due process requirements by failing to convey with reasonable certainty the statute's intended sweep. 496 F.2d at 208. Statutes and regulations which purport to govern conduct must give an adequate warning of that which they command or forbid. *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978). Even a regulation which governs purely economical or commercial activities, if its violation can engender penalties, must be

framed so as to provide a constitutionally adequate warning to those whose activities are governed. *Diebold, Inc. v. Marshall, supra.*

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed. 2d 222 (1972); *Levas & Levas v. Village of Antioch, Illinois,* 684 F.2d 446 (7th Cir. 1981). Because the law assumes that a man is free to steer between lawful and unlawful conduct, the courts must insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. 408 U.S. at 108, 92 S.Ct. at 2298, 33 L.Ed. 2d at 222. If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. *Id.*

Through ostensible use of an unconstitutionally vague statute, the Division has forced Smith to take full responsibility and provide reimbursement to all time share purchasers who received an interest after December 4, 1981, as well as those whose contracts were transferred to Smith. Thus, Smith has been forced to provide reimbursement to individuals from whom Smith never received any payment, and with whom Smith had no contractual relationship. The Florida residents who received the payments from these purchasers, Beach Club, ITSC, Moores, and Sands, have been completely relieved of responsibility for reimbursement at the expense of Smith, the only non-resident involved.

Under the 1981 statute, a seller is defined as:

> [A]ny developer or any other person, or agent or employee thereof, who is offering time share periods for sale to the public in the ordinary course of business.

§ 721.05(12), Fla. Stat. (1981). Smith clearly does not fall within the category of "seller" under the 1981 statute since he did not offer time share periods for sale to the public at any relevant time. The only basis claimed by the Division for Smith's violation of the statute is the failure to provide the written guarantees as a third party transferee under Section 721.17, which provides:

> No *seller* shall sell, lease, assign, mortgage, or otherwise transfer the seller's interest in the accommodations or facilities of a time sharing plan to a third party, unless [the third party agrees in writing to honor certain obligations of the seller].

§ 721.17, Fla. Stat. (1981). (Emphasis added). Clearly, the statute prohibits transfer by the seller without written proof of an assumption of the seller's statutory burden by the third part transferee. Since the statute fails to provide notice of an affirmative obligation on the part of the third party, it appears that liability for reimbursement would remain with the seller unless the seller obtained the written guarantees.

Since Smith is not a seller and has never offered time share periods to the public, it was impossible for him to be apprised of the potential consequences of accepting the transfer of contracts as collateral for the loan to Beach Club. The statute failed to provide Smith with a reasonable opportunity to know that acceptance of the sales contracts without written guarantees was a prohibited act.

Consequently, the statute has impermissibly subjected Smith to substantial civil penalty without notice of the possibility that such penalty might be imposed by acceptance of the sales contracts. *See Diebold v. Marshall, supra.*

This situation is a classical illustration of the need for clarity in statutes providing for penalties. The Division inconsistently found that Sands was not subject to regulation under the statute and that Smith was subject to regulation solely because of a transfer of contracts identical to those transferred to Sands. The Division's conflicting treatment of Sands and Smith illustrates the problems associated with vaguely worded statutes, which allow inconsistent application at the whim of the enforcer upon individuals without notice of the consequences of their acts.

The unfairness of the Division's enforcement of the statute becomes more poignant when the disposition of the purchasers' payments is considered. Sands, Beach Club, and ITSC received the proceeds from the downpayments and installment payments made by many of the purchasers to whom the Division has ordered Smith to provide reimbursement. The Division's construction of the statute outrageously allows Sands to retain payments it has received and requires Smith to reimburse those payments although Smith received only one transfer of twenty-eight sales contracts and Sands received identical transfers on a regular, frequent, and on-going basis.

In 1983, the legislature amended Chapter 721 so that a burden was placed upon third party transferees to as-

sume the guarantees enumerated under Section 721.17. Section 721.17 was amended to include a statement that:

> Should any transfer of the interest of the developer or owner of the underlying fee occur in a manner in which is not in compliance with this section, the terms set forth in this section shall be *presumed to be part of the transfer* and shall be deemed to be included in the instrument of transfer.

§ 721.17, Fla. Stat. (1983). (Emphasis added). Thus, the 1983 statute clearly transfers the duty of the seller to the third party transferee.

Under Florida law, it is presumed that the legislature intended to increase the scope of the statute with these changes. *See Seddon v. Harpster,* 403 So.2d 409 (Fla. 1981). In fact, this change clarifies the fact that the 1981 statute did not provide for an affirmative obligation on the part of third party transferees.

There is a presumption against retroactive application of a statute in the absence of an expressed manifestation of legislative intent to the contrary. 403 So.2d at 411. Because of the differences in the legislative and judicial functions, the courts should avoid retrospective expansion of the meaning of a statute. *Addison v. Holly Hill Fruit Products,* 322 U.S. 607; 64 S.Ct. 1215 (1944). Thus, statutes should operate only prospectively in the absence of a clear statement to the contrary by the legislature. *Id.*

The 1983 statute contains no statement that the responsibility placed upon third party transferees should be retroactively applied. Accordingly, the 1983 statute is inapplicable. *See Addison v. Holly Hill Fruit Products, supra.*

Smith entered into the contract on December 4, 1981, under the regulation of the 1981 statute. He did not have the benefit of the 1983 statute in determining his obligations under the 1981 statute. The First District partially based its construction of the statute upon the 1983 statute. In some circumstances, that might be appropriate. However, here, that use of statutory construction works to retroactively clarify the terms of the earlier statute. Since Smith was operating only with the notice provided by the 1981 statute, this would impermissibly allow the Division to deprive him of property without proper notice in violation of his constitutional rights.

If the legislature intended that the statute apply to third party transferees, then the statute is drafted in an unconstitutionally vague manner. *See Levas & Levas v. Village of Antioch, Illinois, supra.* If, on the other hand, the legislature did not intend to include third party transferees within the scope of regulation under the 1981 statute, then the Division has impermissibly retroactively applied the 1983 statute to regulate Smith's activities. *See Addison v. Holly Hill Fruit Products, supra.* Under either alternative, Smith has been denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. Smith has been deprived of substantial property rights without notice of the possibility that his property rights could be affected by the statute.

Because of the lack of clarity in the statute, Smith did not receive notice of the consequences of entering into the sales contract with Beach Club on December 4, 1981. As a result, he has been forced to assume responsibilities that were not intended at the time of the December 4

transaction. The Division has construed the statute so that Smith has been subjected to penalty without notice. The only out-of-state party has been forced to provide reimbursement of funds which were received by Florida residents who knowingly violated the statute. This inconsistent treatment arising from inconsistent construction of a vague statute offends principles of due process fundamental to our constitution. The Division's inconsistent enforcement has resulted in egregious damage to Smith's fundamental property rights. The inconsistency in treatment between resident and non-resident is intolerable under our federal system. The purpose of the Fourteenth Amendment is to assure that all citizens are treated equally and with the fundamental fairness required by your constitution. The vagueness of Section 721.17, Florida Statutes (1981), has resulted in unequal and inconsistent enforcement which runs afoul of our constitutional guarantee of fundamental fairness. Accordingly, this court should accept jurisdiction and hear the merits of this case.

Respectfully submitted,

ROBERT E. AUSTIN, JR.,
Counsel of Record, and
JERRI A. BLAIR OF
AUSTIN, LAWRENCE & LANDIS
Post Office Drawer 1930
Leesburg, FL 32749-1930
(904) 728-1020

Attorneys for Appellant

APPENDIX

STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION
DIVISION OF FLORIDA LAND SALES,
CONDOMINIUMS AND MOBILE HOMES
725 SOUTH BRONOUGH STREET
JOHNS BUILDING
TALLAHASSEE, FLORIDA 32301-1927

DEPARTMENT OF BUSINESS
REGULATION, DIVISION OF
FLORIDA LAND SALES,
CONDOMINIUMS AND MOBILE
HOMES,

Petitioner,

v.

CASE NO. 82-2848
DOCKET NO. 82158TSC

INTERNATIONAL TIME-SHARE
CONSULTANTS, INC.; DAYTONA
SANDS BEACH CLUB, INC.; and
DAYTONA SANDS, INC. d/b/a
THE SANDS BEACH CLUB,

Respondents.

FINAL ORDER

This order is entered by the Director of the Division of Florida Land Sales, Condominiums and Mobile Homes, Department of Business Regulation, pursuant to Section 120.59, Florida Statutes following review of the recommended order entered in this cause by hearing officer Ella Jane P. Davis, Division of Administrative Hearings on February 22, 1985.

The recommended order is hereby adopted *in toto* as to the findings of fact, conclusions of law, and the recommendation. Based on the findings of fact and conclusions of law, it is

HEREBY ORDERED that:

1. A civil penalty of $10,000 be imposed upon International Time-Share Consulants, Inc. for the misrepresentation charge, and in addition, a $10,000 civil penalty for the failure to escrow and account for all monies during its period of involvement.

2. All principals of International Time-Share Consultants, Inc. are not parties to these formal proceedings pursuant to Section 120.57(1), Florida Statutes.

3. All charges against Daytona Sands, Inc. are dismissed. Richard Moores was not made an individual party to these proceedings.

4. Daytona Sands Beach Club is not a party to these formal proceedings pursuant to Section 120.57(1), Florida Statutes.

5. Daytona Sands Marketing Group is not a party to these formal proceedings pursuant to Section 120.57(1), Florida Statutes.

6. This final order may be appealed within thirty (30) days of its rendition pursuant to Section 120.68, Florida Statutes and the Florida Rules of Appellate Procedure.

DONE AND ORDERED this 17th day of July, 1985 in Tallahassee, Florida.

/s/ E. James Kearney
E. JAMES KEARNEY, DIRECTOR
Division of Florida Land Sales,
Condominiums and Mobile Homes
Department of Business Regulation
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas A. Bell, Esquire, 725 South Bronough Street, Tallahassee, Florida 32301-1927; Donald Bentzoni, Suite 201, 1343 Main Street, Sarasota, Florida 33577; Lydia M. Valenti, Esquire, 11 E. Pine Street, Orlando, Florida 32802; Robert E. Austin, Jr., 900 North 14th Street, Leesburg, Florida 32748; David C. Robinson, Esquire, 326½ South Beach Street, Suite 8, Daytona Beach, Florida 32015; Richard B. Burroughs, Jr., Secretary, Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32301-1927; and Ella Jane P. Davis, Hearing Officer, Division of Administrative Hearings, The Oakland Building, 2009 Apalachee Parkway, Tallahassee, Florida 32301, this 17th day of July, 1985.

/s/ Connie D. Blackman
Connie D. Blackman, Clerk

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS REGULATION, DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS,

Petitioner,

vs. CASE NO. 82-2848

INTERNATIONAL TIME-SHARE CONSULTANTS, INC.; DAYTONA SANDS BEACH CLUB, INC.; AND DAYTONA SANDS, INC. d/b/a THE SANDS BEACH CLUB,

Respondents.

_____/

RECOMMENDED ORDER

This cause is to be decided upon the existing record by the undersigned duly appointed Hearing Officer. (See Procedural Background)

APPEARANCES

For Petitioner, Department of Business Regulation, Division of Land Sales and Condominium (DBR)

Thomas A. Bell, Esquire
725 South Bronough Street
Tallahassee, Florida 32301

For Respondent International Time-Share Consultants, Inc. (ITSC):

David C. Robinson, Esquire,
for trial withdrew by Order
entered effective September
10, 1984.

All pleadings to be served on:
Donald Bentzoni
Suite 201
1343 Main Street
Sarasota, Florida

For Respondent Daytona Sands Beach Club (CLUB):

No Appearance

For Respondent Daytona Sands Inc. d/b/a The Sands Beach Club (SANDS INC)

Lydia M. Valenti, Esquire
11 E. Pine Street
Orlando, Florida 32802

For Respondent Daytona Sands Marketing Group

No appearance

For Respondents Stephen K. Smith individually and as general partner of Smith & Smith

Robert E. Austin, Jr.
900 North 14th Street
Leesburg, Florida 32748

PROCEDURAL BACKGROUND

This action commenced with an August 17, 1982 Notice to Show Cause filed by the Department of Business Regulation, Division of Land Sales and Condominiums (DBR) against three respondents (1) International Time-Share Consultants, Inc. (ITSC) (2) Daytona Sands Beach Club, Inc. (CLUB) and (3) Daytona Sands, Inc. d/b/a The Sands Beach Club (SANDS, INC.). All parties requested formal hearings except Daytona Sands Beach Club, Inc. (CLUB). Nonetheless, the case before the Division of Administrative Hearings was inadvertently styled DOAH Case No. 82-2848 *Department of Business Regulation, Division of Land Sales and Condominiums v. International Time-*

Share Consultants, Inc., Daytona Sands Beach Club, Inc. and Daytona Sands Inc. d/b/a The Sands Beach Club. It was assigned to Hearing Officer Steven G. Pfeiffer.

A subsequent DBR Notice to Show Cause was issued May 13, 1983 against Steven K. Smith, individually and as general partner of Smith & Smith, a Kentucky General Partnership. These Respondents elected a formal hearing and the case before the Division of Administrative Hearings was styled DOAH Case No. 83-1942, *Department of Business Regulation, Division of Land Sales and Condominiums v. Steven K. Smith, individually and as general partner of Smith & Smith.*

Thereafter, both cases were consolidated for hearing by Hearing Officer Marvin E. Chavis. Hearing Officer Chavis heard the case on October 4 and 5, 1983 and concluded on March 19, 1984.

Petitioner called as witnesses Jimmy Townsend, Richard M. Moore, J. W. (Bill) Smith, Jerry C. Rhodes, and Steven K. Smith. Respondent Daytona Sands, Inc. called no witnesses although specific portions of deposition testimony of Donald Bentzoni were published and admitted in evidence. (March 19, 1984 hearing, p. 56; Transcript Vol. III). Respondent International Time-Share Consultants, Inc. called no witnesses. Respondent Smith called Steven K. Smith.

The following joint exhibits were admitted into evidence:

Exhibit 1, Agreement for Deed (May 8, 1981)
Exhibit 2, Assignment of Agreement for Deed (June 24, 1981)
Exhibit 3, Agreement (August 14, 1981)
Exhibit 4, Assignment (August 1981)
Exhibit 5, Conditional Sales Note and Security Agreement (September 17, 1981)

The following exhibits of the Petitioner were admitted:

Exhibit 1, 2 cassette tapes dated December 1, 1981 and December 29, 1982.
Exhibit 2, September 17, 1981 Non-disturbance on Unit 205
Exhibit 4, Deposition of Trudy Showalter (subject to objections)[1]

Exhibit 5, June 17, 1982 Letter

The following exhibits of Respondent Daytona Sands Inc. were admitted:

Exhibit 1, letter regarding hearing improvement (January 26, 1981)
Exhibit 2, letter from J.W. Smith to Richard M. Moores (December 15, 1981)

Petitioner's Exhibit 3, 7 remaining tapes, were not admitted.

Although DBR filed a Notice to Show Cause against Daytona Sands Marketing Group. Inc. that entity was never served, filed no response, did not request a hearing pursuant to Section 120.57(1), and was not represented at the formal hearing. Daytona Sands Beach Club, Inc. (CLUB) was not represented at the formal hearing. Hearing Officer Chavis reserved ruling on the status of these entities and relegated that ruling to the context of the Recommended Order. Because the pleadings were not in a posture that placed the named corporate Presidents of International Time-Share Consultants, Inc. and Daytona Sands Inc. d/b/a The Sands Beach Club on notice, Hearing Officer Chavis resolved that issue by ruling that only the corporations as parties were before him.

---

[1]These objections were ruled on in Hearing Officer Chavis' Order of June 1, 1984.

After the Petitioner (DBR) rested, the various parties made oral motions to dismiss.

Hearing Officer Chavis reserved ruling on these motions until entry of the Recommended Order.

Thereafter, Hearing Officer Chavis severed the party Daytona Sands Inc. and recused himself from other parties' aspects of the case. Subsequently, he recused himself from consideration of either case and all parties. (Orders herein dated June 1, and June 21, 1984).

Joint Motion for Reconsideration was filed by DBR and SANDS, INC.; DBR moved for an extension of time in which to file proposed findings of fact and conclusions of law, and Steven K. Smith and Smith & Smith moved for a *trial de novo*. Arguments both oral and in writing on these motions were considered by the undersigned, resulting in the August 16 and September 13, 1984 Orders herein. The results thereof are that Case No. 82-2848 as to all parties (including the reserved issues) shall be resolved by the instant Recommended Order entered by the undersigned, upon review of the existing record, and Steven K. Smith and Smith & Smith, the only parties to DOAH Case No. 83-1942, shall be permitted a *trial de novo* before another DOAH Hearing Officer. A time schedule was established for parties to file memoranda of law and proposed findings of fact and conclusions of law. The attorney of record for ITSC was permitted to withdraw by Order entered September 10, 1984. Due to notice problems, the period for filing memoranda of law and proposed findings of fact, etc. was thereafter extended by Order of October 23, 1984 for International Time-Share Consultants, Inc. (ITSC) until November 12, 1984 but the orders mailed were returned as not for-

wardable. All submissions have been reviewed and considered and the record reviewed accordingly.

There remain issues to be resolved concerning four Respondents: International Time-Share Consultants, Inc., (ITSC); Daytona Sands Beach Club, Inc. (CLUB); Daytona Sands, Inc. d/b/a The Sands Beach Club (SANDS, INC.); and Daytona Sands Marketing Group (GROUP). Because of the intricate relationship of these corporate entities to each other, the following findings of fact will discuss the parties together. However, the conclusions of law will separately address the issues concerning each individual Respondent. All submissions have been considered and weighed in light of the record and in preparation of this Recommended Order. When a party's proposed findings of fact were inconsistent with the weight of the credible evidence admitted they were adopted and are reflected in the Recommended Order. To the extent that the findings of fact proposed by a party were not consistent with the weight of the credible evidence, they have been either rejected, or, when possible, modified to conform to the evidence. To the extent proposed findings of fact have not been adopted or are inconsistent with the findings herein, they have been specifically rejected as irrelevant or not supported by the evidence. A ruling on each proposed finding of fact has thereby been made either directly or indirectly except where the proposed finding of fact was cumulative, immaterial, or unnecessary.

FINDINGS OF FACT

1. Richard M. Moores is President of the Corporation, Daytona Sands, Inc. (SANDS, INC). He has never been a party to these proceedings. SANDS, INC.'s prin-

cipal asset in 1981 was a forty unit motel which Moores ran on a day to day basis from an office located across the street.

2. International Time-Share Consultants (ITSC) was, in 1981, a corporation in the business of developing and marketing vacation time-share resorts. Its principals were Donald Bentzoni, Kevin Curran, and Howard Shaw. The principals of ITSC are not parties to these proceedings. A real estate broker, Jimmy Townsend, introduced Moores to Bentzoni, Curran, and Shaw.

3. The principals of ITSC negotiated with Moores for sale of its motel by SANDS, INC. and purchase thereof by ITSC, for conversion by ITSC into a vacation time-share resort.

4. On May 8, 1981, SANDS, INC., represented by Moores, entered into an Agreement for Deed (Joint Exhibit 1). Briefly, this Agreement for Deed provided for a single sale of the SANDS, INC. (motel real property) by payment of a fixed price of $1,450,000.00 to SANDS, INC. (principal and President Richard M. Moores.) A complicated payment arrangement was devised and drafted by SANDS, INC's attorney with the primary purpose of imposing obligations on ITSC for the protection of SANDS, INC. and to insure at least the payment in a timely manner of the minimum amount negotiated.

Twenty-five thousand dollars ($25,000) was to be paid on or before the signing of the Agreement For Deed; fifty thousand dollars ($50,000) was to be paid at the closing; an additional twenty-five thousand dollars ($25,000) was due on or before sixty (60) days from the closing date. [The initial $100,000 in payments] Thereafter,

(D) $950,000 of the remaining balance of the purchase price to bear interest at the rate of 6% per annum and to be payable as follows:

(1) $10,000 per month, the first such payment being due on the 90th day from and after the closing date and subsequent payments being due at thirty (30) day intervals thereafter until the $950,000 with interest is paid in full, subject to a thirty (30) day grace period, *or*

(2) 25% of the gross amount of all cash received monthly . . . from purchasers . . . as down payments at closing on the sale of time-share interests . . . to be developed by Buyer, plus all amounts received each month by the Buyer as developer of the time-sharing project as payments on promissory notes executed by purchasers [the third party installment contract paper] . . . the first such payment being due on the 90th day from and after the closing date, and subsequent payments being due at 30-day intervals thereafter until the $950,000 with interest is paid in full, subject to a 30-day grace period. (Joint Exhibit 1, Provision I).

This translates that SANDS INC. was to be paid either $10,000 per month with the first payment due 90 days after closing *or* 25% of the combination of all cash down payments of third party purchasers and payments received on third party purchasers' promissory notes, whichever of the two options was greater.

The Agreement For Deed does not utilize the statutory term of art, "non-disturbance agreement" but also set out that *after* the initial one hundred thousand dollars ($100,000) payments were made, SANDS INC. would execute a "covenant not to interfere", as long as sales of time-share units were made out of time-share unit 205 (the old 208-209 motel units). (Joint Exhibit 1, Provision II.)

Specifically, the parties agreed that:

> At date of closing (as per I(B) above), Seller [Daytona Sands, Inc.] shall execute as to motel units 208 and 209 [the new converted unit 205] an "agreement to release upon sale and closing of sale" in a form mutually agreeable to the parties. Said above described "agreement" shall authorize Buyer to make all desired modifications and upgrading of said rooms in order to appropriately convert the model units as desired of the time-share project. The signing of such an agreement as to those motel units shall also authorize Buyer (ITSC) hereunder to begin marketing the time-share unit weeks as to that motel unit subject to the terms of this Agreement after conversion from a motel unit to a time-share unit. (Joint Exhibit 1, pp. 8-9 Provision IV)

Under the Agreement For Deed, sales additionally could be made from units other than unit 205 (the old 208-209 motel units). SANDS INC. would execute a covenant not to interfere as to those units, *provided SANDS INC. first was paid $30,000 as a release price per motel unit and as long as the sales were made in a certain sequence.* Specifically,

> Seller shall likewise sign such above described "agreement to release upon sale and closing of sales" as to additional motel units (above and beyond 208 and 209) upon payment of a release price of $30,000 per motel unit. The parties agree that the sequence of motel units to be subject to the said "agreement" being signed by Seller upon payment of the $30,000 for each unit shall be in the following order: 104, 105, 212, 114 and 115. The signing of such "agreement" as to additional motel units shall likewise authorize Buyer to convert the motel units as above or begin marketing time-share unit weeks as to those units. Seller, subject to this above sequence, reserves the right to establish which additional motel units, the agreement to re-

> lease shall relate to from time to time upon payment of the $30,000 per unit price. In interpreting this release clause, each $30,000 reduction in the principal balance due of $950,000 (under paragraph I (D) above) shall entitle Buyer hereunder to have an additional motel unit (of Seller's choosing) subject to the initial agreed upon sequence by the subject for the next "agreement" . . . (Joint Exhibit 1, p.9 Provision IV).

Succinctly, the parties SANDS, INC. and ITSC contemplated that upon payment of each $30,000 increment, a new set of 2 motel rooms would be released (in a certain order) to ITSC by SANDS INC. through an "agreement to release upon sale and closing of sales" for ITSC to convert/renovate and sell time-share units out of. Deposits of third party purchasers' money would be used to meet the minimum increments due SANDS INC. or 25% of their gross could be optionally used to pay off ITSC's monetary obligations to SANDS INC. sooner.

The Agreement For Deed also permitted ITSC to sell out of non-released units, *provided 100% of the sale receipts for those units were deposited in escrow:*

> XVI—To clarify the intent of the parties, Buyer, after closing date, shall have a right to market in escrow the time-share estates or interests of rights to use, whether or not the "agreement" called for in paragraph IV [which provides for the release of a unit in a scheduled sequence followed by the subsequent execution of a "covenant not to interfere"—the non-disturbance clause] above has been executed as to a motel unit. (Joint Exhibit 1, Paragraph XVI page 13).

5. On the side, SANDS, INC. (Moores) was to continue to manage the motel *as a motel* for a management fee paid from the motel profits pending sequential conversion/renovation of the facility into approximately 20 time-share

units from its original 40 motel units. Apparently, everyone involved understood that a "show" or "model unit" would first be sold and then other units would subsequently be converted and marketed sequentially using sales money from previous unit sales.

6. The project was undercapitalized from the beginning. ITSC had insufficient cash flow to meet its obligations to SANDS, INC. and so ITSC assigned its rights and obligations under the Agreement for Deed (Joint Exhibit 1) to Daytona Sands Beach Club. Neither SANDS, INC. nor Richard Moores were a signatory to the Assignment (Joint Exhibit 2).

7. Daytona Sands Beach Club (CLUB) is a corporation organized specifically to fund the time-share project. CLUB's original principals were Donald Bentzoni, Kevin Curran, Howard Shaw, Bill Smith, Gladys Carter, Phyllis Cooper, Dennis Taylor, Dennis Showalter, Walter Foster and Jimmy and Ricky Townsend. With the exception of Jimmy and Ricky Townsend who together purchased a single $10,000 share and Bill Smith who pledged some other real property, each club investor contributed $10,000 so that CLUB was able to make the initial payment to SANDS, INC. On June 24, 1981, SANDS, INC. and CLUB closed with payment to SANDS, INC. of the initial $100,000.00 payment. Some CLUB principals changed over a period of time due to buying and selling of shares but at no time was SANDS INC. or Richard Moores an investor in CLUB.

8. Everyone involved testified that ITSC stayed on as the original marketers for the time-share project pursuant to a contract with CLUB, however there appears to be no witness who has ever seen a formal, written contract between the two entities. Any contract with regard to the

sale of real property must be in writing, as must any contract with or between corporate entities, and this one was not. At best, it was, from all the circumstances, an oral *de facto* contract for personal services of the principals of the ITSC corporation, payable by commission. However, it is also clear from the testimony of Bill Smith that ITSC principals and employees signed on conditional installment sales notes and security agreements with third-party purchasers. Apparently, anyone in CLUB or ITSC signed these contracts. Richard Moores signed none.

9. SANDS, INC. ((Moores) continued to manage the motel units.

10. Construction for conversion/renovation to time-share units/weeks by CLUB began June 25, 1981, overseen by Bill Smith for a promised 2% of the sales. This "promise" was apparently made by Donald Bentzoni but whether the promise was on behalf of ITSC or CLUB is uncertain.

11. Sales of time-share units/weeks began July 1, 1981.

12. On August 12 or 13, 1981, Richard Moores accompanied Bill Smith, representing CLUB, to open a Sun Bank account for deposit of purchase moneys and "paper" from third party purchasers (*called* "escrow account") and an operating account, (*called* "special" account) but there is no record evidence that Moores was a signatory on any accounts into which monies from installment checks were placed, nor did he sign checks for operating expenses by ITSC or CLUB. Signatories on the so-called "escrow" account were Bill Smith, Howard Shaw, and Walter Foster. Bill Smith was the only signatory on the "special" account. Thereafter, CLUB used the so-called "escrow" account as

a collection account until the grace period in which a third party purchaser might cancel a contract had passed, then transferred money (by 2 of the 3 signatures) to the operating account and Bill Smith alone disbursed therefrom to ITSC and others.

13. The bank sent a notice to CLUB after every payment made by a third party purchaser. ITSC forwarded some of these payments to the bank and certainly had access to these notices from the bank to CLUB at least until Donald Bentzoni was terminated in November, 1981.

14. Moores for SANDS, INC. had no access to these notices from the bank. Instead, he received a bank statement which reflected total monies deposited, not the number of installment contracts the bank was holding. CLUB and ITSC provided Moores with copies of each installment sales contract, but no one reported the number of contracts put into the bank account and no one otherwise indicated to Moores the identity of contracts or monies put into the bank account. In the summer and early fall of 1981 Moores had no time-share experience and was actively engaged full-time in running the motel. Because of the initial volume of contracts, numerous cancellations, and sometimes sporodic delivery of the contract copies, Moores piled-up his contract copies as they were delivered and did not maintain a personal day-to-day tally of which weeks or which units were successfully sold and which sales were cancelled within the cancellation period.

15. Delivery of the contract copies to Moores was usually done by Trudy Showalter, bookkeeper for ITSC up until September 1, 1981, or by Bill Smith, a principal and eventually President of CLUB. Delivery was usually daily

to either Moores' office or the front desk outside his inner office, but sometimes less frequently.

16. There is no record evidence that Moores ever had anything to do with preparing a public offering statement for the time-sharing project as contemplated by both the Agreement for Deed and Section 721.07 F.S. (1981). Nor is there anything in the record to show Moores ever handled the marketing, talked to prospective third party purchasers, or participated in closings with third party purchasers. His participation in the conversion/renovation appears to have been limited to getting cars moved and cleaning up debris, which activities are reasonably attributable to his continued management of the motel.

17. Sales did not meet expectations and internal dissension occurred among the principals of ITSC. Dissent likewise occurred between principals of ITSC and principals of CLUB as early as September, 1981.

18. Sales not meeting expectations, internal conflict among the principals of ITSC, and problems with operating cash flow resulted as early as August, 1981 in Bill Smith becoming involved on a day to day basis with running the time-share project on behalf of CLUB. In September, Bill Smith became President of CLUB.

19. When sales began on July 1, 1981, Bentzoni, Curran, and Shaw, the ITSC principals acting as ITSC, the paid marketers on behalf of CLUB, made the initial decision to sell out of all 20 projected units and not just unit 205. Thereafter, when Moores expressed concern, Donald Bentzoni apparently convinced everyone at ITSC and CLUB that Moores had given him oral permission to sell out of all 20 or at least 10 units not paid for by CLUB and not yet

formally released by SANDS INC. On the basis of the published portions of Bentzoni's deposition and Bill Smith's testimony, I find this meeting of Moores and Bentzoni never truly occurred.

20. Not until some time in August, however, did Moores realize that sales out of units other than unit 205 were being made. The undersigned finds this to be so after considering the evidence as a whole. Moores, although a licensed Florida real estate agent, had no previous time-share experience; every principal of ITSC, as well as Bill Smith (with CLUB) and several other CLUB principals did. Bentzoni was running up expenses and rationalizing it due to criticism from ITSC and CLUB principals. Moores had not been involved in active real estate sales for more than a decade. The time-share concept was very new to Florida and the statutory law had not yet congealed.[2] Moores was off-premises most of the time, and he depended largely on Jimmy Townsend and Bill Smith to keep him informed.

21. Moores apparently made the connection that sales were being made out of sequence just before Trudy Showalter left the project on September 1, 1981 because he then asked her how he could check up to be sure sales would not occur out of order and she explained the use of the inventory board posted in ITSC's offices and her desk in-

---

[2]All the administrative charges against all Respondents were based on alleged violations of Chapter 721 Florida Statutes (Effective, July 1, 1981). The initial regulation of time-sharing in Florida was by rules contained in Chapter 2-23 F.A.C., issued on an emergency basis in 1976 by the Florida Attorney General. None of the Respondents, however, was put on notice by the pleadings of any violation of the earlier rules, which, oddly enough, remained in effect until December 29, 1981.

ventory sheets. However, as Bill Smith explained, the inventory board intentionally indicated more sales than had actually occurred and indicated sales out of units which had not been sold and which were not being sold out of as part of ITSC's calculated marketing technique to stampede potential third party purchasers into buying on the misrepresentation that "all units are nearly sold out", when few unit-weeks had in fact actually had been sold. The undersigned finds Moores could not be expected to rely on the inventory board.

22. Originally, the CLUB investors were supposed to receive a half-percent per month of gross sales in return for their $10,000 investment but cash flow had dried up. Alternatively, each of the investors was given a week out of unit 205, the only released unit. A non-disturbance drawn by someone associated with CLUB was signed by Moores on September 17, 1981. (Petitioner's Exhibit 2) The actions of all concerned are inconsistent with a suggestion that Moores had agreed to allow sales out of other unreleased units for which he had not been paid or a suggestion Moores had agreed to give non-disturbances (or covenants not to interfere) contrary to the provisions of the Agreemnt for Deed.

23. There was a lot of dissatisfaction among CLUB investors with Bentzoni starting in ear y September. Curran left the project in July or August 981. Shaw subsequently resigned approximately August 20, 1981, critical of the marketing methods. Following an attempted ouster of Bentzoni at a CLUB shareholders meeting, Bill Smith persuaded Bentzoni to leave as marketer approximately November 10, 1981.

24. However, in fact, sales *were* being made out of sequence. Moores had not been paid the release price per unit. By the end of the first three months of sales, neither CLUB nor ITSC had paid Moores the first $10,000 payment due September 24, 1981 under the Agreement For Deed. Moores objected to the sales out of these other units, but Moores, for SANDS INC., had no other leverage besides foreclosure, and foreclosure would have scuttled the entire project.

25. Over Thanksgiving weekend, Richard Moores, Bill Smith and Jimmy Townsend took a trip by car and listened to a series of instructional tapes on time-sharing. Moores expressed a number of concerns which he had by way of conversation with other people about what was going on with CLUB's time-share project and ITSC's marketing of it. He thereafter spoke to a formal meeting of CLUB shareholders about these same hearsay concerns. He had *heard* CLUB and ITSC were employing non-licensed sales persons, failing to pay withholding taxes, failing to obtain the necessary withholding and social security numbers, and selling units out of sequence. Moores admits that at this meeting he told CLUB he wanted veto power over any future marketers they hired. There is no indication CLUB voted him this power or that he ever exercised such a veto.

26. Moores checked the Agreement for Deed and realized at that point that Provision XVI provided for sales out of non-released units as long as the units were marketed in escrow. There is conflicting testimony in that Moores says Bill Smith told him he had no standing to object and Bill Smith says that Moores orally authorized continued sales out of 10 unreleased units instead of the total 20 claimed by Bentzoni, but the uncontradicted testimony of

Moores and Bill Smith was that *Bill Smith never told Moores that the monies were not being escrowed* even though Bill Smith had a fair knowledge of time-sharing as far back as July 1981 and knew the statute required either that funds be escrowed or in the alternative that a non-disturbance instrument be issued. Even Bill Smith admits that he told Moores sales out of a lot of improper units had cancelled. During the time Bill Smith was president of CLUB, he knew that sales were being made without the requisite non-disturbance clauses being given. During the time he handled the sales on an interim basis, Bill Smith sold thirty (30) to forty (40) units but did not escrow monies; he did not give non-disturbance instruments; he did not request that Moores give non-disturbance instruments to third party purchasers. There was never a document of equal dignity entered into by SANDS INC. or Richard Moores which would vary the clauses of the Agreement for Deed concerning conditions precedent to be fulfilled by ITSC or its Assignee, CLUB, before non-disturbances would be granted by SANDS, INC.

27. Bill Smith and perhaps some other unnamed persons participated in sales without being licensed to sell real estate in Florida. Some of these persons may have only been bookkeeping or clerical personnel. It is unclear whether they were employed by the principals of ITSC wearing their ITSC "hat" or their CLUB "hat" or by Bill Smith on behalf of CLUB. On December 15, 1981, Bill Smith wrote Richard Moores assuring him CLUB was in full compliance with all Florida Statutes including real estate sales. (Respondent Moore's Exhibit 2).

28. Sometime in late 1981 or early 1982, CLUB entered into an agreement (which was back-dated to August

14, 1981, the date of the first sale to a third party purchaser which had not cancelled) with Smith & Smith through Steven K. Smith. (Joint Exhibits 3 and 4) Thereby, CLUB obtained additional cash financing in exchange for third party purchasers' time-share installment contracts, presumably worth a certain retail value of unit weeks. These were contracts from which the Agreement for Deed had contemplated proceeds going to SANDS, INC. unless escrowed in a separate third party purchaser escrow account. The proceeds from all sales from all unreleased units should have been escrowed by CLUB and had not been. CLUB retained some of the cash provided by Smith & Smith and used some of it to pay toward its indebtedness to SANDS INC. under the Agreement for Deed. Neither Moores nor SANDS, INC. were signatories to any agreement between CLUB and Smith & Smith or Stephen K. Smith.

29. Based upon the testimony of Petitioner's expert accounting witness, Jerry C. Rhodes, no individual escrow accounts for third party purchasers were maintained; no single account or separate books were kept for these monies; no clear records of any income or disbursements from either CLUB's mislabelled "escrow" or "operating" account have been maintained. It is impossible to establish a completed audit trail of the monies taken in by ITSC or CLUB. The project failed and closed down on February 6, 1982, and third party purchasers did not get their accommodations.

30. CLUB filed no request for formal hearing pursuant to Section 120.57(1) Florida Statutes and entered no appearance before the Division of Administrative Hearings. Indeed, by Order of May 20, 1983, Hearing Officer

Pfeiffer denied a Motion to join CLUB in these proceedings.

31. The majority of the money from the CLUB "escrow" account at Sun Bank went to Daytona Sands Marketing Group, but Daytona Sands Marketing Group filed no response to the Order to Show Cause, did not request a hearing pursuant to Section 120.57(1) Florida Statutes, and was not represented at formal hearing.

CONCLUSIONS OF LAW

INTRODUCTION:

Real etsate time-sharing is regulated in Florida by Chapter 721 Florida Statutes, enacted effective July 1, 1981. The statute governs situations in which "use rights" (or ownership of the right to use) are divided by the dimension of time. The time-sharing concept is akin to a lease or license for the use of specific real property for a period commencing on a day certain and ending on a day certain, which period recurs again and again, usually on an annual basis. [Example: Purchaser A "owns" the first two weeks in January for every year, forever.] In the typical situation, there will be intervening period of non-use and of use (also for specific recurring time segments) by other time-share owners. [Example: Purchasers B-Z each own 2 week segments respectively from the third week in January to the end of December for every year, forever.] Time-share purchasers/owners pay only for the time used without purchasing the physical real proper-

ty in fee simple. Real estate time-sharing generally provides the purchaser/owner the exclusive right to use and occupy his purchase during the specified time-share period.

1. International Time-Share Consultants, Inc. (ITSC)

A. *The Motion to Dismiss:* Section 721.05 Florida Statutes (1981) provides the following pertinent definitions:

> "(5) 'Developer' means the person creating the time-sharing plan.
>
> "(9) 'Offer to sell,' 'offer for sale,' 'offered for sale' or 'offer' means solicitation of purchasers the taking of reservations, or any other method whereby a purchaser is offered the opportunity to participate in a time-sharing plan.
>
> "(12) 'Seller' means any developer or any other person, agent or employee thereof, who is offering time-share periods for sale to the public in the ordinary course of business, except a person who has acquired a time-share period for his own occupancy and later offers it for resale."

ITSC originated the concept of converting an old motel into the Daytona Sands time-share project. In this capacity, ITSC would have been a "developer," as defined by Section 721.05, Florida Statutes (1981) but that statute was not effective for six more days. Initially, ITSC intended to finance the time-share venture itself with funds ITSC was receiving from its independent time-share marketing project elsewhere. After assigning its interest in the Agreement for Deed to CLUB, on June 24, 1981, ITSC entered into an agreement with CLUB to market the time-shares *on behalf of* CLUB and to receive payment for such marketing involvement *from* CLUB. Al-

though ITSC's corporate status[3] as a "developer" ceased; it was now a "seller," as defined by Section 721.05(2) Florida Statutes (1981). If there were some direct evidence that ITSC through its principals prepared or filed the public offering statement contemplated by the Agreement for Deed and Section 721.07 Florida Statutes (1981) or even if there were some solid indication Bill Smith was converting/renovating the motel for ITSC instead of directly for CLUB there might be something to tie ITSC in as a "developer" after June 24, 1981. There is not. However, the position of corporate ITSC as a marketer-seller extended from the date sales began, July 1, 1981 at least until November, when CLUB ousted Donald Bentzoni and started searching for a new marketer. This construction of the continuing corporate involvement of ITSC is supported by the record even though ITSC's principals apparently left the project one at a time over a period of several months. (Curran left in July or August 1981; Shaw left August 20, 1981; Bentzoni was persuaded by Bill Smith to leave about November 10, 1981). Therefore, ITSC's position that the corporation got out of the transaction on June 24, 1981 and hence was not subject to the provisions of Chapter 721, Florida Statutes, which became effective July 1, 1981, is not viable and the ITSC Motion to Dismiss on those grounds is accordingly denied. Concomitantly, it is also clear that the Petitioner and thus the Division of Administrative Hearings has jurisdiction over

---

[3]Principals of ITSC were also principals of CLUB, and may individually have continued as "developers" and "sellers" under the statute which became effective on July 1, 1981. However, Petitioner affirmatively waived proceeding against any of the corporate officers in their individual capacities.

the corporate person of ITSC and the subject matter of the charges against it, but that ITSC may be held liable in this proceeding, if at all, only for its actions as a "seller" between July 1, 1981 and of November 10, 1981.[4]

B. *The Charges:* Having resolved the threshold issue that ITSC was a "seller" subject to regulation by Chapter 721 Florida Statutes (1981) from July 1, 1981 through early November, 1981, the charges against ITSC may be considered in light of the facts found.

B1. ITSC is charged with failing to employ licensed real estate salesmen, brokers, or broker salesman, pursuant to Chapter 475, as required by Section 721.20 Florida Statutes (1981). While there is some evidence in the record that some employees of the time-share project were unlicensed, there is no clarity whatsoever of who hired them or authorized their activities (CLUB or ITSC) or during what period they were employed or even how many such unlicensed persons were employed. Apparently some employees and CLUB investors sold and were thus "sellers" themselves and some were clerical only and did not sell; some were paid by ITSC check and some by CLUB check;

---

[4]In arriving at this conclusion of law, I have not overlooked Petitioner's Memorandum of Law setting forth that initial state regulation of time-sharing occurred in rules contained in Chapter 2-23 of the *Florida Administrative Code* which rules were issued on an emergency basis in 1976 by the Florida Attorney General. However, Petitioner has not introduced the content of these rules in evidence, has not charged any Respondent under them (see footnote 2), and has not argued them as applicable to any Respondent and consequently no basis exists by which they may be applied to the instant case. Furthermore, as Chapter 721 Florida Statutes (1981) is clearly quasi-penal and substantive in nature, it may not be applied retroactively against any Respondent.

some were trainees and/or on straight salary (which would take them outside of Chapter 475 F. S.). While it might be possible to bind CLUB by the actions of its agent, ITSC, reverse agency of the superior (CLUB) to the inferior (ITSC) is not recognized in Florida so as to bind ITSC by the actions of its employer CLUB. Therefore, one is forced to conclude that Petitioner has not met its burden of proving against ITSC the charge of failure to employ licensed real estate salesmen.

B2. ITSC is charged with misrepresenting a fact or creating a false or misleading impression regarding the time-share plan in violation of Section 721.11(2)(a) F. S. (1981) by leading purchasers to believe their accommodations would be available to them when in fact they were not. Clearly, any number of misrepresentations were made first to mislead and induce third parties to purchase, and second to mislead and induce third parties into purchasing specific units which at the time of purchase had yet to be converted/renovated. Unfortunately, absolutely no evidence from any third party purchaser was introduced by Petitioner as to what "impression" he had formed of when his accommodations would be available or who or what entity made misrepresentations to him. Certainly, however, it is clear that the accommodations were never available to any third party purchaser due to the collapse of the project's financing. Consequently, on balance, Petitioner has proved against ITSC the charge of misrepresentation pursuant to Section 721.11(2)(a) Florida Statutes.

B3. ITSC is charged with failing to place 50% of the funds received from purchasers in an escrow account, pur-

suant to Section 721.08(3) Florida Statutes (1981). Section 721.08(3) provides as follows:

> "Each escrow agent shall maintain separate books and records for each time-sharing plan and shall maintain such books and records in accordance with good accounting practices."

This sub-section normally applies to *escrow agents* defined in Section 721.08(1)(b) with whom *sellers*, (in this case ITSC and CLUB), under certain specified conditions, are required to place funds received from third party purchases. Instead of using the Sun Bank accounts already established by CLUB or establishing a true escrow account on behalf of third party purchasers and thereafter letting the bank act as escrow agent, ITSC acted as escrow agent for CLUB and later CLUB acted as its own escrow agent. ITSC and CLUB apparently commingled many types of funds. In this capacity, both thereby violated Section 721.08(3) Florida Statutes (1981), but ITSC's involvement ended in early November, 1981, before the bulk of sales by Bill Smith for CLUB. With this mitigation, the failure to escrow an account charge has been proved against ITSC.

II. Daytona Sands Beach Club, Inc. (CLUB):

Upon a review of the entire record and upon the foregoing findings of facts, CLUB has never been a party to these proceedings and is therefore not before the Division of Administrative Hearings pursuant to Section 120.57(1).

III. Daytona Sands, Inc. d/b/a The Sands Beach Club (SANDS, INC.)

A. *The Motion to Dismiss:* By its Motion to Dismiss, SANDS, INC., argues that by the very nature of an Agreement for Deed, SANDS, INC. was in the position of a mortgagee and that all its acts and the acts of its President, Moores, on its behalf constitute only the normal acts of a mortgagee protecting its security interest. Its position is well taken as to the charges but is not jurisdictional. The Motion to Dismiss is denied. The Petitioner and thus the Division of Administrative Hearings has jurisdiction over SANDS, INC. and the subject matter of the charges against it.

B. *The Charges:* SANDS, INC. entered into the Agreement for Deed with ITSC for ITSC's scheme of development and marketing. The posture of SANDS, INC. in this matter is simply that of a former owner or transferee who sold the motel pursuant to an Agreement for Deed to an entity which failed to successfully develop and market a time-share resort. The status of SANDS, INC., under the Agreement for Deed is that of a mortgagee, *Hoffman v. Semet*, 316 So.2d 649 (Fla. 4th D.C. A. 1975); Section 697.01, Florida Statutes. A mortgagee has no fiduciary duty to ensure monies are escrowed or that a nondisturbance is provided by ITSC or its successor CLUB, to third party purchasers.

Petitioner's argument apparently recognizes the exempt status of a mortgagee, but the essence of Petitioner's case against SANDS, INC. is based on the premise that its President, Richard Moores' activities on behalf of SANDS, INC. after July 1, 1981 make him as much a "seller" as those engaged in the day-to-day time-share sales operation and that these activities fall into six categories.

Specifically, Petitioner has charged and argues in its Memorandum of Law in lieu of proposed findings of fact and conclusions of law, that the following "passive" actions of Moores transformed SANDS, INC. into a "seller" within the statutory definition:

> (1) Participating in the operation of the time-sharing plan through veto power over subsequent marketers.
>
> (2) Requiring termination of a marketer.
>
> (3) Allowing sales to continue without statutorily required nondisturbance clauses despite knowledge of the necessity for a lack of existence of same.
>
> (4) Allowing sales to continue despite knowledge of unlicensed salespersons.
>
> (5) Allowing transfer of sales contracts to a third party in a manner in violation of 721.17 Florida Statutes. (1981)
>
> (6) Allowing transfer of unit weeks to a third party in a manner in violation of Section 721.12 Florida Statutes (1981)

One does not have to pierce the corporate veil very far to determine that President Moores acted at all times as an authorized agent for SANDS, INC. and, to all intents and purposes, *was* SANDS, INC., but with that qualification, did he do anything that classified him as a "seller" pursuant to Section 721.05(12)? He did not.

B1. Admittedly, Moores operated as a concerned holder of a security interest. In light of case law, his demand for veto power over future marketers, even if exercised, would not have merged Moores or SANDS, INC. with ITSC or CLUB, "sellers" under the Act,

Sheedy v. Vista Properties, Inc. 410 So.2d 561 (Fla. 4th D. C. A. 1982); *Armetta v. Clevetrust Realty Investors,* 359 So.2d 540 (Fla. 4th DCA 1978); cert. denied 366 So. 2d 879 (Fla. 1978). *Rice v. First Federal Savings & Loan Association,* 207 So.2d 22, (Fla. 2d D.C.A. 1968), cert. denied 212 So.2d 879 (Fla. 1968),[5] but we do not have to reach that issue since a veto was never granted or exercised. The first charge is therefore not proven against SANDS, INC.

B2. Petitioner only established ouster of Bentzoni by CLUB due to general dissatisfaction. That Moores also was dissatisfied, and vocally so, does not merge Moores or SANDS, INC. with anyone else who might qualify as "sellers" under the Act. The second charge is therefore not proven.

B3-6. The remaining four charges fall in the category of "allowing" ITSC or CLUB to do something. The only "allowing" seems to have occurred in Moores delaying foreclosure where he was entitled to do so in hopes the mortgagor (CLUB) could work things out. Had SANDS, INC. granted non-disturbance agreements before being paid by CLUB (and perhaps before even CLUB was paid in full by third-party purchasers), SANDS, INC. would have abandoned its security interest, totally clouded title for all concerned and possibly have actually acquiesced in

---

[5]There appear to be no cases directly on point for timeshare resorts under Chapter 721 Florida Statutes (1981). Therefore, some cases cited reach the stated conclusions for purposes of Chapter 711 F.S. (1976) [now Chapter 718 F.S. (1983) i.e. condominiums] and Chapter 440 F.S. (1981) i.e. workers' compensation.

CLUB's wrongful business practices. Moores did not do this. He further entered into no document (certainly no document of equal dignity) to abandon any of SANDS, INC's rights under the Agreement for Deed. "Allowing," as charged, covers purely passive acts which, if such "allowing" even took place,[6] is not sufficient in light of the great weight of evidence and foregoing findings of fact to the contrary that Moores did not participate in sales to third party purchasers in any way to merge SANDS, INC. with any other entity, *Chotka v. Fidelo Grouth Investors,* 383 So.2d 1169 (Fla. 2d DCA 1980), *Armetta v. Clevetrust Realty Investors,* supra., *First Wisconsin National Mank v. Roose,* 348 So.2d 610 (Fla. 4th DCA 1977), *Dunson v. Stockton Whatley, Davis & Co.,* 346 So.2d 603 (Fla. 1st D.C.A. 1977), *Rice v. First Federal Savings & Loan Association,* supra. Therefore charges 3-6 are not proven against Sands, Inc.

IV. *Daytona Sands Marketing Group Inc.:* Upon a review of the entire record and upon the foregoing findings of facts, GROUP is not a party to these proceedings and is therefore not before the Division of Administrative Hearings pursuant to Section 120.57(1).

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is RECOMMENDED that the Department of Business Regulation enter a Final Order which:

---

[6]Pursuant to the foregoing findings of fact, it has *not* been established with certainty who employed unlicensed sales persons and it *has* been established that within two weeks of voicing his concerns, Moores was assured in writing that everyone was within statutory compliance.

1. Imposes civil penalties of $10,000 upon International Time-Share Consultants, Inc., a corporation, for the misrepresentation charge and $10,000 for the failure to escrow and account for all monies during its period of involvement charge.

2. Determine all principals of International Time-Share, Inc., are not parties to these formal proceedings pursuant to Section 120.57(1) F.S.

3. Dismisses all charges against Daytona Sands, Inc. a corporation, and determines Richard Moores individually is not a party to these proceedings.

4. Determines Daytona Sands Beach Club is not a party to these formal proceedings pursuant to Section 120.57(1) F.S.

5. Determines Daytona Sands Marketing Group is not a party to these formal proceedings pursuant to Section 120.57(1) F.S.

DONE and ORDERED this 22nd day of February, 1985, in Tallahassee, Florida.

/s/ Ella Jane P. Davis
ELLA JANE P. DAVIS
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32301
(904) 488-9675

Filed with the Clerk of the Division of Administrative Hearings this 22nd day of February, 1985.

Copies furnished:

Thomas A. Bell, Esquire
725 South Bronough Street
Tallahassee, FL 32301

Donald Bentzoni
Suite 201
1343 Main Street
Sarasota, FL

Lydia M. Valenti, Esquire
11 E. Pine Street
Orlando, FL 32802

Robert E. Austin, Jr.
900 North 14th Street
Leesburg, FL 32748

David C. Robinson, Esquire
326½ South Beach Street
Suite 8
Daytona Beach, FL 32015

Richard B. Burroughs, Jr.
Secretary
Dept. of Business Regulation
The Johns Building
725 S. Bronough Street
Tallahassee, FL 32301

STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION
DIVISION OF FLORIDA LAND SALES,
CONDOMINIUMS AND MOBILE HOMES
725 SOUTH BRONOUGH STREET —
JOHNS BUILDING
TALLAHASSEE, FLORIDA 32301-1927

DEPARTMENT OF BUSINESS REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES,
Petitioner,

CASE NO. 83-1942

DOCKET NO. 83101TSC

v.

STEVEN K. SMITH, individually and as general partner, SMITH & SMITH,
Respondents.

———————————/

FINAL ORDER

This order is entered by the Director of the Division of Florida Land Sales, Condominiums and Mobile Homes, Department of Business Regulation, State of Florida, pursuant to Section 120.59, Florida Statutes, following a review of the entire record, including the Recommended Order entered in this cause by Donald D. Conn, Hearing Officer, on September 10, 1985.

Respondents Steven K. Smith, individually, and as general partner, Smith and Smith filed certain Exceptions to Recommended Order which includes exceptions both

to the findings of fact and conclusions of law of the hearing officer. In accordance with Rule 28-5.404, Fla. Admin. Code, parties may only file exceptions to the findings of fact and, accordingly, those exceptions concerning conclusions of law will not be addressed.

1. In paragraph 1 of its exceptions, respondents appear to be challenging a conclusion of law by the hearing officer as to the interpretation of the term "seller's interest". To the extent that such exception deals with conclusion of law, it will not be addressed. If in fact respondents are challenging the finding by the hearing officer that Beach Club sold its interest in the thirty-four units by December 4, 1981, such finding of fact is adequately supported by petitioners' exhibits 1, 2, and 3. See also Transcript pages 67 and 68.

2. In paragraph 2 of its exceptions, respondents apparently take exception to the finding by the hearing officer concerning the execution by respondents of the later assignment. In its finding, the hearing officer correctly points out that respondents prepared and executed a later assignment (Petitioner's Exhibit 3). That assignment contains the following language:

> . . . That for and in consideration of the matters aforesaid, and the benefits to be derived by both FIRST PARTY and SECOND PARTY under the terms of the above described Contract dated August 14, 1981, the receipt and sufficiency of which is hereby acknowledged. . . .

Thus, the hearing officer was correct in his finding that the assignment contained the above language reaffirmed the terms of the initial August 14, 1981 contract. That

August 14, 1981 contract was clearly, by its terms, a contract to sell Beach Club's interest to respondents. The hearing officer's finding is adequately supported by the record.

3. In paragraph 3 of its exceptions, respondents appear to challenge the conclusion of law which is inappropriate pursuant to Rule 28-5.404, Fla. Admin. Code.

4. In paragraph 4 of its exceptions, respondents challenge the hearing officer's conclusions of law, which challenge is inappropriate pursuant to Rule 28-5.404, Fla. Admin. Code.

5. In paragraph 5 of its exceptions, respondents challenge the hearing officer's conclusions of law, which challenge is inappropriate pursuant to Rule 28-5.404, Fla. Admin. Code.

6. In paragraph 6 of its exceptions, respondents challenge the hearing officer's conclusions of law, which challenge is inappropriate pursuant to Rule 28-5.404, Fla. Admin. Code.

The hearing officer's findings of fact and conclusions of law as set forth in the Recommended Order, and reproduced in their entirety below, are hereby adopted.

"RECOMMENDED ORDER

On June 17, 1985, this case was heard in Daytona Beach, Florida, before Donald D. Conn, a duly designated Hearing Officer of the Division of Administrative Hearings. The parties were represented as follows;

Petitioner: Thomas A. Bell, Esquire
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32301

Respondent: Robert E. Austin, Esquire
Post Office Drawer 1930
Leesburg, Florida 32748

The petitioner, Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, issued a Notice of Violation against respondent, Steven K. Smith, individually and as general partner, Smith and Smith, charging that he failed to comply with Section 721.17, *Florida Statutes* (1981), in acquiring an interest in Daytona Sands Beach Club, a/k/a The Sands Beach Club. At the hearing petitioner introduced three exhibits and called respondent to testify and respondent called one witness. The respondent moved to dismiss the case after petitioner's case in chief, and a ruling was reserved on that motion to allow review of the evidence presented and also to allow incorporation of the ruling in this Recommended Order. A transcript of the hearing has been filed.

The parties were allowed to submit posthearing proposed findings of fact pursuant to Section 120.57(1)(b)4, *Florida Statutes*. A ruling on each proposed finding of fact which was filed has been made either directly or indirectly in the Recommended Order, except when such proposed findings of fact have been rejected as subordinate, cumulative, immaterial, or unnecessary.

FINDS OF FACT

1. On or about December 4, 1981, respondent executed an Agreement with Daytona Sands Beach Club, Inc. (Beach Club), the developer of the project, which was back-dated to August 14, 1981. By the terms of this Agreement, Beach Club sold its interest in thirty-four units of a forty unit condominium time-share development, having a retail value of $150,000, to respondent for fifteen percent of the retail value. Respondent testified that the Agreement was simply a financing arrangement whereby Beach Club assigned time-share periods in thirty-four units as collateral for a loan made by respondent. He stated he received none of the indicia of ownership. However, this is not confirmed by the terms of the Agreement which specifically refer to a sale of Beach Club's interest to respondent, and an arrangement by which Beach Club would then market and sell the units which respondent had purchased from them. The Agreement also expressly provides that it "constitutes the entire agreement between the parties and there are no other terms, conditions, or agreements which are not set forth herein or referred to herein." Additionally, it was respondent who had used this form Agreement previously in other projects and who provided this Agreement for executions by Beach Club.

2. Of the thirty-four units involved in respondent's Agreement with Beach Club, time-share purchasers had acquired time-share periods in twenty-eight units prior to the execution of this Agreement.

3. An Addendum to the Agreement expresses the intention of Beach Club and respondent that "the present

structure of the Sands Beach Club, Inc., contemplates right to use only and not fee simple title." This was a "Right to use project" whereby time-share purchasers acquired no interest in the underlying real property and were simply leasing the right to use particular units for a specified number of weeks each year. Thus, Beach Club had an ownership interest in the project at the time the Agreement was executed with respondent despite the fact that time-share purchasers had already acquired a right to use twenty-eight of the thirty-four units referenced in the Agreement. Respondent knew this was a "right to use" project at the time the Agreement was executed.

4. Several months after the execution of this Agreement and Addendum, respondent had an Assignment prepared which he executed with Beach Club. Although this later executed Assignment specifically acknowledges the prior executed Agreement and Addendum, respondent contends that this Assignment was prepared and executed for the sole purpose of providing him with additional security for his purported financing arrangement with Beach Club. However, by acknowledging the prior executed Agreement and Addendum which, by their terms refer to a sale of Beach Club's interest to respondent, the Assignment confirms that respondent was not simply providing financing in this transaction.

5. Respondent did not execute any additional agreement in association with the transaction other than as set forth above. Specifically, there is no evidence that respondent agreed in writing to honor fully the rights of time-share purchasers to occupy and use the facilities and to cancel their contracts and receive appropriate refunds,

nor did respondent agree in writing to comply with Chapter 721 or to assume all obligations of the seller to these purchasers. There is no evidence that notice of respondent's Agreement with Beach Club was mailed to each purchaser.

CONCLUSIONS OF LAW

The Division of Administrative Hearings has jurisdiction over the subject matter and parties of this case. Section 120.57(1), *Florida Statutes*.

The parties agree that the applicable law in this case is Section 721.17, *Florida Statutes* (1981) which states:

> 721.17 Transfer of seller's interest to third party.—No seller shall sell, lease, assign, mortgage, or otherwise transfer the seller's interest in the accommodations or facilities of a time-sharing plan to a third party, unless:
>
> (1) The third party agrees in writing to honor fully the rights of purchasers of the time-sharing plan to occupy and use the accommodations or facilities.
>
> (2) The third party agrees in writing to honor fully the rights of purchasers of the time-sharing plan to cancel their contracts and receive appropriate refunds, as provided in this chapter.
>
> (3) The third party agrees in writing to comply with the provisions of this chapter for as long as the third party continues to sell the third-sharing plan or for as long as purchasers of the time-sharing plan are entitled to occupy the accommodations or use the facilities, whichever is longer in time.
>
> (4) The third party agrees to assume all obligations of the seller to purchasers.

> (5) Notice is mailed to each purchaser of the time-sharing plan affected thereby within 30 days of the sale, lease, assignment, or other transfer.
>
> Persons who hold mortgages on the property constituting a time-sharing plan before the public offering statement of such plan is approved by the division shall not be considered third parties for the purposes of this section.

The time-share purchasers were "purchasers" for purposes of this statute, notwithstanding the fact that they acquired a leasehold rather than a fee simple interest in these units. Section 721.05(11), (13), and (14), *Florida Statutes* (1981). Beach Club was a "seller" under the terms of this statute. Section 721.05(12), *Florida Statutes* (1981). Respondent was a third-party purchaser for purposes of Section 721.17, *Florida Statutes* (1981), who was required by the terms of that statute to agree, in writing, to certain enumerated guarantees and protections for the purchasers upon the execution of his Agreement with Beach Club.

Respondent argues that the obligation under Section 721.17, *Florida Statutes,* was solely on Beach Club, the seller, to insure that the required third-party agreements were made, and notice provided to the purchasers, before they executed their Agreement. Further, he argues that even if he shared in the obligation to comply with Section 721.17, *Florida Statutes* (1981), no penalty or method of enforcement is provided for failure to comply with its provisions. It is urged by Respondent, as evidence of this lack of penalty or enforceability, that the Legislature substantially amended Section 721.17 in 1983 with the passage of Chapter 83-264, Laws of Florida, and in so doing provided that the guarantees and protections set forth

therein "shall be presumed to be a part of the transfer and shall be deemed to be included in the instrument of transfer" which any seller and third-party purchaser execute. Respondent contends that since this provision was not in the 1981 Statute that is applicable here, his Agreement with Beach Club was valid and he is not obligated in any way by the terms of Section 721.17, *Florida Statutes* (1981).

In enacting Chapter 721, *Florida Statutes*, in 1981 the Legislature declared its purpose in Section 721.02 to:

> (1) Give statutory recognition to real property timesaring in this state.
>
> (2) Establish procedures for the creation, sale, *and operation* of time-sharing plans.
>
> (3) Require *every* time-sharing plan offered for sale or created and *existing* in this state to be subjected to the provisions of this chapter. (Emphasis supplied.)

It is clear that a broad application of the provisions of Chapter 721 designed to protect the rights of time-share purchasers was intended. The petitioner was given enforcement power in Section 721.26, *Florida Statutes* (1981) which included the authority to impose a civil penalty of up to $10,000 "against any developer, exchange program, seller, managing entity, association, *or other person* ~~for~~ a violation of this chapter." (Emphasis supplied) Section 721.26(5)(d)1., *Florida Statutes* (1981). This authority is not contingent or dependent upon remedies being available to purchasers, but allows enforcement by petitioner against any person who violates any provision of Chapter 721.

Respondent argues that Chapter 721 with its regulatory and enforcement provisions is a penal statute, and as such should be strictly construed. When there is doubt as to the intent of the Legislature in enacting a penal statute, he argues, doubt should be resolved in favor of the person against whom penalties are sought.

Yet, penal statutes should not be so strictly construed as to emasculate the statute and defeat an obvious legislative intent. *State v. Hooten,* 122 So.2d 336 (Fla. 2nd DCA 1960); *Martin v. State,* 367 So.2d 1119 (Fla. 1st DCA 1967). Statutes enacted for the public benefit should, in fact, he liberally construed in favor of the public even though they contain penal provisions. *Miami Beach v. Berns,* 245 So.2d 38 (Fla. 1971); *State v. Hamilton,* 338 So. 2d 561 (Fla. 1980). The legislative intent to broadly apply the provisions of Chapter 721 to protect the public, particularly time-share purchasers, is clear, and as such should not be thwarted by the strict construction urged by respondent that ignores the plain meaning of the words used in the statute.

In order to give meaning to the broad legislative purpose behind Chapter 721, Section 721.17, *Florida Statutes* (1981), is construed in pari materia with Section 721.26 (5)(d)1., *Florida Statutes* (1981), to authorize petitioner to impose a civil penalty on any person who violates Section 721.17 by executing an agreement, either as seller or third-party purchaser, without the written guarantees and protections required thereby of the third-party purchaser. Respondent did not provide the required written assurances to time-share purchasers who had previously acquired interests in twenty-eight of the units referred to

in his Agreement with Beach Club, and he therefore was in violation of Section 721.17, *Florida Statutes* (1981)."

In addition to the Division's power pursuant to Section 721.26(5)(d)1, Florida Statutes (1981), to impose a civil penalty for any violation of Chapter 721, Florida Statutes (1981), the Division also has authority pursuant to Section 721.26(5)(b), Florida Statutes (1981), as follows:

> (b) The division may issue an order requiring a developer, exchange program, seller, managing entity, association, *or other person, or other assignees*, or agents, to cease and desist from an unlawful practice under this chapter *and take such affirmative action* as in the judgment of the division will carry out the purposes of this chapter. [Emphasis supplied].

Additionally, since respondents, contrary to law, failed to execute the necessary document required by section 721.17, Florida Statutes (1981), respondents should be ordered to undertake the obligations they would otherwise have incurred by the execution of that document, as well as the payment of the civil penalty for their falure to do so.

Based upon the record, the Recommended Order, and this Final Order, IT IS THEREFORE ORDERED that:

1. Respondents shall remit to the Division of Florida Land Sales, Condominiums and Mobile Homes within twenty (20) days of rendition of this Final Order a civil penalty in the amount of Five Thousand Dollars ($5000), as proposed by the hearing officer.

2. Respondents shall within ninety (90) days of rendition of this Final Order do all of the following:

a) Contact all purchasers of the time-share plan known as the Sands Beach Club who are either listed on petitioner's Exhibits 1, 2 or 3 or who acquired their interest after December 4, 1981.

b) Advise all such purchasers that pursuant to this Final Order, respondents are required to honor fully the rights of those purchasers to cancel their contracts and receive appropriate refunds as provided in Chapter 721, (1981).

c) Provide refunds to all purchasers electing to receive refunds.

d) Notify the Division of all contacts made, refunds requested and refunds made.

3. This Final Order may be appealed pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla. R. App. P., by filing a notice of appeal conforming to the requirements of Rule 9.110(d), Fla. R. App. P., both with the appropriate district court of appeal, accompanied by the appropriate filing fees, and with this agency within thirty (30) days of rendition of this Final Order.

DONE AND ORDERED this 17th day of December, 1985.

/s/ E. James Kearney
E. JAMES KEARNEY, DIRECTOR
Division of Florida Land Sales,
Condominiums and Mobile Homes
Department of Business Regulation
State of Florida

Copies furnished to:

Thomas A. Bell, Esquire
Department of Business Regulation

Robert E. Austin, Jr., Esquire
Post Office Drawer 1930
Leesburg, Florida 32748

Steven K. SMITH, individually and as general partner of Smith and Smith, Appellant,

v.

DEPARTMENT OF BUSINESS REGULATION, DIVISION OF LAND SALES, CONDOMINIUMS AND MOBILE HOMES, Appellee.

No. BL-49

District Court of Appeal of Florida, First District

Dec. 31, 1986

On Motions for Clarification and Rehearing March 19, 1987.

JOANOS, Judge.

Steven K. Smith appeals from a final order of the Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes which orders him to pay a civil penalty and to assume obligations to time share purchasers. We affirm.

In May 1981 The International Time-Share Consultants, Inc. (ITSC) and The Sands Beach Club (Sands) entered into an Agreement for a deed under which ITSC agreed to purchase Daytona Sands Motel from Sands and convert it to a vacation time share development. The purchase price was to be paid through periodic payments and the assignment of deferred payment obligations of purchasers of the time-share units. The record reveals that the project was under-capitalized from the beginning.

In June 1981 ITSC assigned its interest in the agreement to Daytona Sands Beach Club, Inc., (Beach Club), who took over as developer. Beach Club is a corporation

which was organized specifically to fund the time share project. ITSC entered into a separate Agreement with Beach Club to market the units.

During summer and fall of 1981, ITSC, on behalf of Beach Club, sold time-share units to third-parties. Sales did not meet expectations. Beach Club arranged for Steven Smith, appellant, to provide financing to Beach Club. Seven thousand dollars in cash was to be advanced for each fifty thousand dollars of third-party purchase money notes held by Beach Club and transferred to Smith. Also the collateral included the paper on 28 unit weeks which had already been sold. The Agreement executed on December 4, 1981 was dated back to August 14, 1981 when these contracts were created. The Agreement signed was one Smith had drafted and used on previous occasions involving time-share transactions.

In addition to the paper on 28 unit weeks, Smith was assigned six unsold units as collateral for the remaining balance of his loan, which were to be traded for notes as they became available under the financing Agreement. The Assignment contract was drafted by appellant's attorney in February 1982.

Within 60 days of Smith's involvement with the time-share plan, it ceased to operate. The project closed down February, 1982 and some of the time-share purchasers did not get their accommodations. The Division brought action against ITSC, Beach Club and Sands, and this action against appellant. The Division accused appellant of failure to comply with section 721.17, Florida Statutes (1981).

The administrative hearing officer found that Smith had received an Assignment of interest from Beach Club in 34 of 40 units and had not agreed in writing pursuant to section 721.17, Florida Statutes (1981) to honor the rights of time-share purchasers or to assume the obligations of the seller to the time-share purchasers. The final order reflects that section 721.26(5)(b), Florida Statutes (1981) authorized the imposition upon Smith of the obligations that would have been incurred by the execution of the Agreement as required under section 721.17, Florida Statutes (1981). The Division ordered Smith to: 1) pay a civil penalty of $5,000, 2) honor the rights of purchasers to cancel their contract and receive appropriate refunds, and 3) assume Beach Club's obligation to the time-share purchasers.

Appellant's actions were governed by Chapter 721, entitled Real Estate Time-Sharing Plans. All of appellant's challenges pertain to the hearing officer's application of section 721.17 Florida Statutes (1981), "Transfer of sellers interest to third party", which provides in pertinent part:

> No seller shall sell, lease, assign, mortgage, *or otherwise transfer the seller's interest in the accommodations or facilities of a time-sharing plan to a third party unless:*
>
> (1) *The third party agrees in writing to honor fully the rights of purchasers of the time-sharing plan to occupy and use the accommodations or facilities.*
>
> (2) The *third party agrees in writing to honor fully the rights of purchasers* of the time-sharing plan to cancel their contracts and receive appropriate refunds, as provided in this chapter.

(3) The *third party agrees in writing* to comply with the provisions of this chapter for as long as the third party continues to sell the time-sharing plan or for as long as purchasers of the time-sharing plan are entitled to occupy the accommodations or use the facilities, whichever is longer in time.

(4) The *third party agrees to assume all obligations of the seller to purchasers.*

(5) *Notice is mailed to each purchaser of the time-sharing plan affected thereby within 30 days of the sale, lease, assignment, or other transfer.* (Emphasis supplied).

Smith's liability is solely a question of the application of Chapter 721, "Real Estate Time-Sharing Plans" to his involvement in this case. Smith insists that his role in facilitating this time share plan is totally distinct from that of a "seller" as found in section 721.17, Florida Statutes (1981). However, in asserting that section 721.17 (1981) is not applicable to him he ignores the language and intent of Chapter 721 as a whole.

The hearing officer correctly highlighted all of the appropriate sections of Chapter 721, which when read together, emphasize that Chapter 721 was designed to establish procedures to regulate the entire *operation* of time-sharing plans. A large section of the chapter is devoted solely to the regulation of time-share operations by the Division for protection of the public, and the deterrence and punishment of those, like appellant, who seek to involve themselves in the time-share operation without fulfilling this chapter's statutory requirements designed for the purchaser's protection.

[1] Appellant fails to note that in Chapter 721 the definition of "seller" includes "*any other person* who is

offering time-share periods for sale to the public in the ordinary course of business, except a person who has acquired a time-share period for his own occupancy. . ." Smith does not fall within the latter category.

Also appellant regards himself as a financier, to distinguish himself from parties covered by the statute in question. However, appellant ignores the language found in section 721.05(9) "offer for sale" which includes as part of the definition ". . . *any other method whereby a purchaser is offered an opportunity to participate in a time-sharing plan.*" The record revealed that appellant was gaining a financial benefit from his involvement in this time-share transaction, and had sent payment books to purchasers to facilitate the process of their payment, which in turn enhanced appellant's financial gain.

Appellant also argues that he cannot incur liability under Chapter 721 because he did not receive an interest in real property so his involvement was innocent by Chapter 721 standards. We disagree. The record reveals that appellant was a professed businessman familiar with time-share operations. Appellant admittedly drafted the Agreement upon which he relied, and has used the same contract in his previous time-share transactions.

[2] Also appellant signed an Addendum to the Agreement contract, which stated that he understood the contract to involve the "right to use" time-share units rather than ownership of fee simple titles. The Addendum was the only documentation of modification to the Agreement. No other language in the document was altered. A review of the Agreement's language reveals that appellant obviously intended to participate in the sale and

marketing of time-share units. Appellant also participated in filling in the blanks regarding, among other things, the retail value of the units, principle and interest collections and percent down payment. The record reveals that when he filled in the blanks in December appellant knew he was involved in a "right to use" project. Ironically, on page 7 of the Agreement under Partnership Obligations (a), the Agreement states that appellant "will comply with all rules and regulations of any real estate commissions and other governmental agencies in all states . . . *relating to* the advertising and sale of real properties and shall comply with *all* statutes . . . governing its sales activities". (Emphasis supplied). There is no dispute in the instant case that appellant failed to agree in writing to honor fully the rights of the purchasers involved in this time-sharing plan as required pursuant to section 721.17 Florida Statutes (1981). We find that by participating in the time-share operation his activities brought him under the umbrella of Chapter 721 and he failed to comply with the writing and practical requirements of the statute.

[3] In addition, as appellee correctly asserts, a second contract called the Assignment was drafted by Smith's attorney and executed by the parties involved six months after the initial Agreement. As the final order accurately reflects, on page 1 of the Assignment the language of the contract acknowledges the receipt and sufficiency of the Agreement initially executed. Appellant testified that he never told Beach Club that the Agreement and/or Assignment as drafted by him or his attorney were no longer in effect, or operating in a fashion other than that described in the contracts. Also, the record reveals that appellant admits being assigned six *unsold* unit weeks,

yet he did not sign a document stating he would honor the rights of the purchasers, nor did he give them notice within 30 days of the date of the Assignment, as required by section 721.17(5), Florida Statutes (1981). The record further reevals that he sent the purchasers a letter explaining that the promissory notes had been assigned to him, so that all payments were to be made to appellant instead of Beach Club. By presenting, signing and executing the Agreement whereby Beach Club transferred its interest to appellant, appellant was promoting the sales of the time-share units as regulated by Chapter 721.

The hearing officer also correctly emphasized the *Construction* section of the Agreement found on page 11 of the Smith's contract, where it is asserted that the contract "constitutes the entire Agreement between the parties, and shall be construed in accordance with the laws of Florida". We find that the hearing officer's conclusion that Smith had knowingly purchased an interest in the time-share project is supported by competent substantial evidence.

[4] Appellant next contends that the Division is really applying the 1983 version of Chapter 721 to his actions, resulting in an invalid retroactive application of a statute. We disagree. Section 721.17, Florida Statutes was modified by the legislature to expressly assert that the terms of the statute would be a presumed part of any instrument of time-share transfers, and also now expressly imposes a duty on transferees or owners of underlying fees to honor the rights of purchasers involved in the time-share contract. We acknowledge that the 1983 version of section 721.17 is a more artfully drafted statute.

Even appellant admits that this version of the statute would have obviously applied to his actions in this case to impose liability on him for his failure to comply with the statute's requirements enacted to protect purchasers. However, appellee correctly asserts that the legislature's intent to provide for the protection of purchasers against *any person* involved in the *operation* of time-share plans is obvious from the 1981 version of chapter 721 as well. Because the legislature's intent was more artfully expressed in 1983 does not mean, as appellant argues, that the general intent to protect purchasers from participants in time-share plans was any less effective in 1981. Furthermore, appellee argues persuasively that in seeking legislative intent it is proper to consider acts passed at subsequent legislative sessions. *Watson v. Holland*, 20 So. 2d 388 (Fla. 1944), *motion denied*, 325 U.S. 839, 65 S.Ct. 1408, 89 L.Ed.2d 1965 (1945). Also, in looking at the "Regulation" provisions of section 721.26 Florida Statutes (1983), it is obvious that the language authorizing the Division to take affirmative action to penalize violators of Chapter 721 is identical to the language found in the 1981 statute, and expresses the same intent to protect purchasers as found in the 1981 version.

[5] Appellant further contends that it was Beach Club that failed to comply with section 721.17, Florida Statutes (1981). Therefore, appellant reasons that the contract Beach Club executed with appellant is void so appellant cannot be held liable pursuant to his involvement with the contract. We disagree. Appellant is not a naive, unsuspecting citizen that became unknowingly entangled in this enterprise. As appellee points out, and the hearing officer emphasized, appellant drafted the con-

tract on which he relied to gain a benefit by participating in this time-share venture. Section 721.17, Florida Statutes (1981) prohibits a transfer of any portion of the seller's interest until the third-party purchaser (appellant) complies with the statutory requirements. Appellee argues persuasively that appellant, as drafter, did not expressly incorporate these requirements into his contract or perform the actions outlined in the statute, yet executed his contract and began collecting purchaser's money. We agree with the hearing officer that had appellant read section 721.17 prior to implementing his "program" in Florida, he would have had to realize that his involvement was contemplated by the legislature in Chapter 721.17 and would have been forced to incorporate such requirements into his Agreement to make it lawful. Now that appellant has arranged for, and accepted the Assignment and transfer of Beach Club's interests to himself for his financial gain he should be estopped from asserting that the contracts be drafted and executed are void. Also, it is well settled that contracts are construed against the drafter in the face of any ambiguities. *Hurt v. Leatherby Ins. Co.*, 380 So.2d 432 (Fla. 1980).

[6] Appellant also argues that had he read the statute he would not have been put on notice that his activities would be governed by Chapter 721, because "third-parties" is not specifically defined, nor is an "affirmative obligation" on a third-party expressly outlined. However, appellant ignores the regulation language found in section 721.26(5)(b) and (d) Florida Statutes (1981), where the statute clearly explains that if the Division has reason to believe that a violation of a chapter has oc-

curred, it may institute enforcement against any developer, seller . . . *or other person:*

> b. The Division may issue an order requiring a developer, seller . . . or *other person* or other assignees to cease and desist from an unlawful practice.
>
> d. The Division may impose a civil penalty against any developer . . . seller or *other person* for violation of this chapter. (emphasis supplied).

The language in the Regulation provision, section 721.26, contrary to appellant's argument, clearly outlines the affirmative action the Division is authorized to take with regard to violations of Chapter 721.

[7] Next, appellant argues that in comparison to the penalty imposed on ITSC, the penalties imposed on appellant by the Division were disproportionately harsh, and the Division's findings were not supported by competent substantial evidence. We disagree. The Division was authorized by section 721.26, Florida Statutes (1981) to impose a civil penalty on appellant as high as $10,000.00, but only penalized appellant $5,000.00. In addition, the only other obligations imposed by the Division in its Final Order are the requirements that appellant comply with section 721.17 Florida Statutes (1981). As reflected in the Final Order, the hearing officer based his recommendation on appellant's testimony, and the Agreement, Addendum and Assignment that appellant drafted and/or approved. We find that to be sufficient competent substantial evidence to support the holding of the Final Order.

[8] Based on appellant's initial premise that section 721.17, Florida Statutes (1981) does not readily place a burden on third-party transferees, appellant argues that

the Division's interpretation which places a duty on him, created few rights and liabilities, so constituted an unauthorized rule. Here again, we agree with appellee that the intent of Chapter 721, Florida Statutes (1981) is obvious from the language found in the sections previously referred to, and section 721.17, Florida Statutes (1981) specifically outlines the obligations third-party participants have to purchasers in the time-sharing business. We also agree with appellee that had appellant read the statute before presenting his Agreement for execution in Florida, he would have been on notice of the statutory requirements involving third-party purchasers like himself. The Division did not "interpret" section 721.17 to create any rights or liabilities not already present n the language of the statute.

[9] Appellant next argues that secton 721.26(5) Florida Statutes (1981), which authorizes the Division to take affirmative action against a developer . . . seller or any other person or assignee, is an unlawful delegation of authority, for it amounts to giving the Division unbridled discretion to pursue "other persons" such as appellant. Again appellant ignores the circumstance that the Division in its Final Order did nothing more than require Smith to follow the guidelines clearly pertaining to third-party purchasers such as himself as found in § 721.17, Florida Statutes (1981). The language of the Final Order's requirements traces the steps of the statute, and only carries out the purposes of Chapter 721 as designed to protect purchasers. Appellee argues persuasively that it is clear from the language of the chapter that the legislature only granted the Division the authority to carry out the purposes of Chapter 721, within the guidelines set out in

Chapter 721. There has been no unauthorized delegation of authority. *See, Conner v. Joe Hatton, Inc.*, 216 So.2d 209 (Fla. 1968), *appeal after remand*, 240 So.2d 145 (Fla. 1970).

As this court stated in *Department of Business Regulation, Div. of Florida Land Sales and Condominiums v. Smith*, 471 So.2d 138 (Fla. 1st DCA 1985), when faced with another challenge to the Real Estate Time-Sharing Act:

> Nothing has been shown that would justify our assuming that the questioned statute is arbitrary, unreasonable or oppressive in its operation. Nothing in the record shows the statute to be anything but a reasonable regulation to conserve the public welfare. *Smith* at 143.

Therefore we affirm the hearing officer's finding that Smith had received an Assignment of interest from Beach Club and had not agreed in writing pursuant to Section 721.17, Florida Statutes (1981) to honor the rights of the time-share purchasers or assure the obligations of the seller to the time-share purchasers. As the Florida Supreme Court aptly stated in *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971):

> We are persuaded to apply the rule that a statute enacted for the public benefit should be construed liberally in favor of the public even though it contains a penal provision. In this posture a reasonable construction should be applied giving full measure to every effort to effectuate the legislative intent . . . The intent of the act as reflected by its language and legislative setting is absorbed into and becomes a part of the law itself.

City of Miami Beach at 40.

The Final Order of the Department of Business Regulation, Division of Land Sales, Condominiums and Mobile Homes is AFFIRMED.

THOMPSON and NIMMONS, JJ., concur.

ON MOTIONS FOR CLARIFICATION AND REHEARING

JOANOS, Judge

We grant appellee's motion for clarification of a sentence that was printed inadvertently in error and modify the last line of the opinion to read as follows: The Final Order of the Department of Business Regulation, Division of Land Sales, Condominiums and Mobile Homes is affirmed.

We deny appellant's motion for rehearing except to clarify that Smith received an assignment of interest from Beach Club in 34 *unit weeks* of 40 condominium units, and as described in the opinion, 28 of the unit weeks had already been sold, and the remaining 6 unit weeks assigned were unsold. Smith did not receive an assignment of 34 of the 40 units themselves, as our statement of what the hearing officer found misleadingly implies. However, we find that Smith's liability under Section 721.17 Florida Statutes (1981) remains the same and is not diminished by this classification, for liability under Section 721.17 Florida Statutes (1981) is not contingent upon quantity of the interest assigned.

Appellant's motion for rehearing is otherwise denied.

THOMPSON and NIMMONS, JJ., concur.

Supreme Court, U.S.
FILED
JAN 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-918

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STEVEN K. SMITH, individually
and as a general partner of
SMITH & SMITH,
Appellant,

v.

FLORIDA DEPARTMENT OF BUSINESS
REGULATION, DIVISION OF LAND
SALES, CONDOMINIUMS AND
MOBILE HOMES,
Appellee.

ON APPEAL FROM THE FIRST DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

MOTION OF APPELLEE TO DISMISS (or AFFIRM)

W. Douglas Moody, Jr.
Department of Business
Regulation
725 South Bronough Street
Tallahassee, FL 32399-1007
(904) 488-7365

Attorney for Appellee

BEST AVAILABLE COPY

28 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I. WHETHER THE CONSTRUCTION OF SECTION 721.17, FLORIDA STATUTES (1981) BY THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA IS A BASIS FOR REVIEW BY THE UNITED STATES SUPREME COURT.

II. WHETHER SECTION 721.17, FLORIDA STATUTES (1981) PROVIDED NOTICE THAT IT APPLIED TO THE TRANSFER OF A TIME SHARE SELLER'S INTEREST.

PARTIES TO PROCEEDINGS BELOW

1. Original parties appearing before the Florida Department of Administrative Hearings was the Florida Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, Petitioner below and Appellee herein; Steven K. Smith, individually and as general partner of Smith & Smith, Respondents below and Appellant herein.

2. A Final Order by the Department was entered finding violations by Smith which was appealed to the First District Court of Appeal of Florida by Steven K. Smith individually and as general partner of Smith & Smith as Appellant and the Florida

Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes as Appellee.

3. The Florida First District Court of Appeal upheld the Final Order and jurisdiction was sought in the Florida Supreme Court by Smith as Appellant, which was denied. The Florida Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes appeared as Appellee.

TABLE OF CONTENTS

	Page
Questions presented	i
Parties to proceedings below	ii
Table of Authorities	v
Statutory Provisions Involved	2
Statement of the Case.....	6
Arguments	
I. Construction of a state statute by a state court does not invoke the jurisdiction of the United States Supreme Court.	8-12
II. The language of the Section 721.17, Florida Statutes (1981) properly informed third party purchasers that they were to assume	12-19

certain responsibilities
when the time-share interest
of a seller was transferred
to them.

Conclusion 20

TABLE OF AUTHORITIES

CASES	PAGE(S)
U.S. SUPREME COURT	
Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982)	17
Hortonville Joint School Dist. No.1 v. Hortonville Ed. Ass'n., 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976)	9
U.S. v. Thirty-seven (37) photographs, 402, U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822; Reh.Den. 403 U.S. 924, 91 S.Ct. 221, 29 L.Ed.2d 702 (1971)	9
FLORIDA	
Nat. Merchandise v. United Serv. Auto Ass'n., 400 So.2d 526 (Fla. 1st DCA 1981)	16
Southern Crane Rentals v. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983)	16
Smith v. Dept. of Business Regulation, 504 So.2d 1285 (Fla. 1st DCA 1986)	12
Wilcox v. Atkins, 213 So.2d 879 (Fla. 2nd DCA 1978)	16

STATUTES	PAGE(S)
Florida Statutes	
Chapter 721	11, 15, 17, 18
721.05(5) (1981)	2
721.05(9) (1981)	3
721.05(12) (1981)	3
721.17 (1981)	3, 4, 5, 8, 10, 12 13, 14 15, 17 18
721.17 (1983)	8, 9, 10

No. 87-918

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STEVEN K. SMITH, individually
and as a general partner of
SMITH & SMITH,
Appellant,

v.

FLORIDA DEPARTMENT OF BUSINESS
REGULATION, DIVISION OF LAND
SALES, CONDOMINIUMS AND
MOBILE HOMES,
Appellee.

ON APPEAL FROM THE FIRST DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

MOTION OF APPELLEE TO DISMISS
(or AFFIRM)

Pursuant to Rule 16.1, Appellee, the Florida Department of Business Regulation, Division of Land Sales, Condominiums and Mobile Homes moves to dismiss the appeal

filed on behalf of Steven K. Smith, individually and as a general partner of Smith & Smith (hereinafter "Smith"). The motion is grounded on the fact that the decision by the Florida District Court of Appeal was based on a state court's construction of state law and that no substantial federal question is presented for review by this Court. Smith therefore has no standing to invoke this Court's appeal jurisdiction.

STATUTORY PROVISION INVOLVED

"Developer" means the person creating a time sharing plan. Section 721.05(5), Florida Statutes (1981).

"Offer to sell," "offer for sale," offered for sale," or "offer" means solicitation of purchasers, the taking of reservations, or

any other method whereby a purchaser is offered the opportunity to participate in a time-sharing plan, Section 721.05(9), Florida Statutes (1981).

"Seller" means any developer or any other person, or agent or employee thereof, who is offering time share periods for sale to the public in the ordinary course of business, except a person who has acquired a time share period for his own occupancy and later offers it for resale. Section 721.05(12), Florida Statutes (1981).

No seller shall sell, lease, assign, mortgage, or otherwise transfer the seller's interest in the accommodations or facilities of a time sharing plan to a third party, unless:

(1) The third party agrees in writing to honor fully the rights of the

purchasers of the time sharing plan to occupy and use the accommodations or facilities.

(2) The third party agrees in writing to honor fully the rights of purchasers of the time sharing plan to cancel their contracts and receive appropriate refunds, as provided in this chapter.

(3) The third party agrees in writing to comply with the provisions of this chapter for as long as the third party continues to sell the time sharing plan or for as long as purchasers of the time sharing plan are entitled to occupy the accommodations or use the facilities, whichever is longer in time.

(4) The third party agrees to assume all obligations of the seller to purchasers.

(5) Notice is mailed to each purchaser of the time sharing plan affected thereby within thirty days of the sale, lease, assignment, or other transfer.

Persons who hold mortgages on the property constituting a time sharing plan before the public offering statement of such plan is approved by the Division shall not be considered third parties for the purposes of this section. Section 721.17, Florida Statutes (1981).

STATEMENT OF THE CASE

While Appellant Smith's statement of the case is substantially correct, one important area has been glossed over in the Division's opinion. Rather than restating the case, the Division will point out that area.

Initially it should be noted that while Smith had never been involved in a right to use time-share project prior to the Beach Club project, it is important to point out that Smith had in fact had been involved in numerous other time-share estate projects prior to the Daytona Sands project. Also, Appellant suggests that Steve Smith's relationship with the Beach Club as simply that of a "financier" providing financing. While this was Appellant's position in the tribunal below,

it is apparent from the reading of the Final Order that the hearing officer completely and totally rejected this argument. In fact, the hearing officer in his Recommended Order acknowledged that this was Smith's position and rejected it.

Therefore, it would be more accurate to state that all references in Appellant's statement of the facts to such a financing arrangement should be characterized as allegations by Appellant, which allegations below were rejected. As previously noted and as found by the hearing officer, the document between Smith and the Beach Club specifically provided that Smith was acquiring an interest in the time-share units rather than merely "paper".

ARGUMENTS

I. Construction of a state statute by a state court does not invoke the jurisdiction of the United States Supreme Court.

Smith argues that its liability under Section 721.17, Florida Statutes (1981) was pursuant to an invalid retroactive application of Section 721.17, Florida Statutes (1983). The opinion by the First District Court of Appeal of Florida, which is at issue, found Smith's liability pursuant to the 1981 statute. the 1983 version of Section 721.17, Florida Statutes was only utilized by the First District Court of appeal to support its conclusion that the legislative intent of the 1981 version of Section 721.17, Florida Statutes

was to require third party purchasers such as Smith to assume the liabilities along with all assets received.

Smith now wishes this Court to construe Section 721.17, Florida Statutes (1983) as retroactively applied. This Court lacks jurisdiction authoritatively to construe state legislation. U.S. v. Thirty-seven (37) Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822; Reh. Den. 403 U.S. 924, 91 S.Ct. 221, 29 L.Ed.2d 702 (1971). Further, this Court has stated that it is bound to accept interpretations of state law concerning the interpretation of that state's law by one of its courts. Hortonville Joint School Dist. No.1 v. Hortonville Ed. Ass'n., 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976).

The issue raised by Smith concerning an invalid retroactive application of Section 721.17, Florida Statutes (1983) rather than applying the 1981 version of Section 721.17, Florida Statutes has no basis in fact. It ignores the opinion of the First District Court of Appeal of Florida which stated that it did not retroactively apply the 1983 act but merely interpreted and construed the 1981 version of Section 721.17, Florida Statutes. Construction of a state statute by a state court does not involve the jurisdiction of this Court.

Smith's third argument is that the 1981 statute was arbitrarily expanded by the First District Court of Appeals. The First District acknowledged that the 1983 version of Section 721.17, Florida Statutes was more artfully worded that the 1981

version. They concluded however, that the legislative intent in the 1981 act was consistent with the 1983 version. Smith was a sophisticated time share investor who had been involved in previous time share investments. His involvement had developed to the extent that the contract utilized in the purchase was drafted by him. He was familiar with Chapter 721, Florida Statutes, and as stated by the First District had he read it in its entirety, he would have realized that he was to assume certain obligations upon purchasing the interests of the seller. Smith's argument becomes more tenuous in light of the agreement entered into which stated that the agreement would comply with all statutes governing its activities. Concerning that particular portion of the agreement, the First District stated as follows:

> Ironically, on page 7 of the Agreement under Partnership Obligations (a), the Agreement states that appellant "will comply with all rules and regulations of any real estate commission and other governmental agencies in all states relating to the advertising and sales of real properties and shall comply with all statutes... governing its sales activities". (Emphasis in Original). Smith v. Department of Business Regulation, 504 So.2d 1285 (Fla. 1st D.C.A. 1986).

The First District's opinion therefore did not arbitrarily expand Section 721.17, Florida Statutes (1981) but merely construed the statute to effectuate the legislative intent and did no more than what Smith agreed to do within the contract.

II. The language of Section 721.17 (1981) properly informed third party purchasers that they were to assume certain responsibilities when the time share

interest of a seller was transferred to them.

The 1981 version of Section 721.17 states that a seller shall not transfer his interest in a time share project without acquiring certain assurances from the third party purchaser.

Smith, as a third-party purchaser argues that the statute failed to provide him with a reasonable opportunity to know that acceptance of the sales contracts without written guarantees was a prohibited act and it would result in a civil penalty being assessed against Smith as the third party purchaser.

Section 721.17, Florida Statutes (1981), is worded to require that the third party purchaser who received the seller's

interest must assume certain obligations. It is equally apparent that if these obligations were not assumed by the third party purchaser, any contract transferring the interest of the original seller would have been in violation of Section 721.17, Florida Statutes (1981).

The pertinent issue before this court is not whether there is notice of the potential for a civil penalty against third party purchasers if the provisions of Section 721.17, Florida Statutes (1981) were not included in the act but whether a third party purchaser was put on notice upon reading Section 721.17, Florida Statutes (1981) that they were to assume certain responsibilities upon the seller transferring its interests to that third party purchaser. The 1981 version of Section 721.17, Florida Statutes provided

sufficient notice.

Smith attempts to avoid the responsibility of the 1981 version of Section 721.17, Florida Statues even though he was a sophisticated investor in time-sharing. Smith was the drafter of the contract used, stated in the contract that the agreement was to comply with all appropriate statutes, and that the contract was to be construed in accordance with the laws of Florida. Smith was familiar with Chapter 721 generally and had he read it, would have realized his responsibilities under Section 721.17, Florida Statutes (1981).

There is no substantial federal question before this court because this matter was properly resolved by the First District pursuant to Florida Law. Under

Florida law, contracts are made in legal contemplation of existing applicable law. Southern Crane Rentals v. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983). In Florida, the law of a state is a basic ingredient of every contract and forms a part of that contract as if it were expressed or referred to in its terms. Nat. Merchandise v. United Serv. Auto. Ass'n., 400 So.2d 526 (Fla. 1st DCA 1981).

Further, Florida law provides that a contract includes not only that which is written but also terms and matters which, through not actually expressed, are applied by law, and these are as binding as the terms which are actually written. Wilcox v. Atkins, 213 So. 2d 879 (Fla. 2d DCA 1978).

The fallacy in Smith's argument is not only that he was the drafter of the contract but that he also was aware that the Division regulated the time share industry and of Chapter 721 because of his prior involvement in time sharing in Florida. He had the opportunity and was expected to consult relevant legislation in advance of entering into the contract. See, Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982). After however, drafting the contract, executing it, modifying it three months later, and being a sophisticated time-sharing investor, he now wishes to assert that the protections placed in Chapter 721 should not be applicable to him.

Smith is being required to do no more than what would have occurred had he complied with 721.17, Florida Statutes

(1981). He had established a procedure for receiving payments from purchasers of time share weeks and was to receive additional monies as weeks were sold. Had this project been completely developed, he would have had the opportunity to reap all of the benefits without any exposure to the potential liability, even though he was the seller of the project and had certain obligations and responsibilities under Section 721.17, Florida Statutes. As a seller, he should receive proceeds from a sale, however, he should be equally responsible for all associated liabilities. Any other construction would frustrate the intent of Chapter 721 in general and Section 721.17, Florida Statutes, in particular.

Under Florida case law, Smith was on constructive notice that if he did not

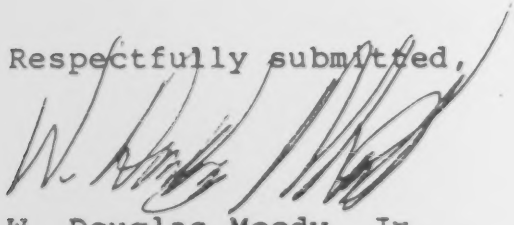
include all provisions within the contract that should have been included, those provisions were still considered part and parcel of the contract. Under Florida law, he was made responsible for and obligated to the time-share purchasers because based on the transaction occurred, he was to assume those obligations and responsibilities.

This case was adequately addressed by the First District Court of Appeal of Florida utilizing state law. No substantial federal question has been presented before this court to invoke its jurisdiction.

CONCLUSION

For the foregoing reasons Appellee, the Florida Department of Business Regulation, Division of Land Sales, Condominiums and Mobile Homes requests that this Court dismiss the appeal of Appellant Smith or in the alternative, affirm the decision of the First District Court of Appeal.

Respectfully submitted,



W. Douglas Moody, Jr.
Staff Attorney
Department of Business
Regulation
725 South Bronough Street
Tallahassee, FL 32399-1007
Counsel for Appellee